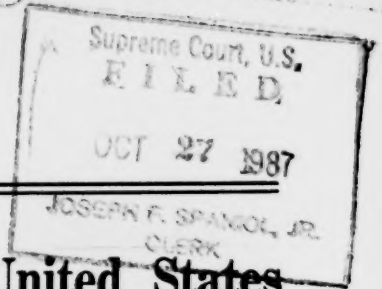


87-710

No. _____



In The
Supreme Court of the United States
October Term, 1987

CATHERINE O. SWAN, HENRY J. ANGELO,
WILLARD T. RUBIN, RAYMOND J. TESNER
and MARY MILHEIM,

Petitioners, -

vs.

ALAN MILES RUBEN and JEANNE RATHBUN,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district judge properly exercises discretion in awarding attorney fees against a civil rights plaintiff and her attorney and in favor of certain individual defendants based upon findings that the case was frivolous, unreasonable and without foundation, and that it was prosecuted by counsel in bad faith where there has been no probable cause finding of discrimination against such individual defendants; there has been inadequate preparation for trial; there has been a failure to timely file a pretrial brief and lists of exhibits and witnesses in accordance with court rules; there has been a frivolous motion to disqualify defense counsel; there has been a letter proposing settlement and blatantly threatening burdensome depositions none of which were ever taken; and there has been absolutely no evidence adduced at trial that such individual defendants were actively engaged in or even remotely responsible for acts of discrimination.

2. Whether, in reviewing the discretion of a district judge in awarding attorney fees, the court of appeals has the responsibility to uphold the district judge if there is some basis in the record to support the findings, as opposed to conducting a search of the record for some basis on which to negate the findings.

3. Whether a district judge properly exercises discretion in utilizing the federal judiciary's inherent power to award attorney fees against an attorney of record at the culmination of the litigation on the merits on the basis of an aggregation of multiple acts of misconduct where the judge does not explicitly warn the attorney in terms of sanctions at the time of each act or omission.

4. Whether a district judge properly exercises discretion in awarding attorney fees against a civil rights plaintiff and counsel under the federal judiciary's inherent power or 28 U.S.C. § 1927 or 42 U.S.C. § 2000e-5(k) where the judge focuses on the cumulative shortcomings of the entire proceeding rather than on the impact upon defendants of discrete acts of misconduct.

5. Whether the acceptance by a district judge of the late filing of pretrial briefs and lists of witnesses and exhibits without imposing a sanction at the time of filing during trial precludes the court from later sanctioning counsel for such delinquency, where the judge did in fact explicitly admonish counsel concerning the delinquency prior to commencement of trial.

6. Whether an imposition of attorney fees against an unsuccessful plaintiff in a frivolous civil rights case is an abuse of the discretion of a district judge for the sole reason that the attorneys representing the plaintiff at the sanction hearing were themselves the subject of the sanction hearing.

7. Whether a district judge properly exercises discretion in awarding attorney fees against an unsuccessful civil rights plaintiff and her counsel without attempting to allocate wrongdoing between plaintiff and her counsel where the judge finds that the case was frivolous, unreasonable and without foundation and that it was prosecuted by counsel in bad faith.

8. Whether negligence or inadvertence as opposed to intentional misconduct will support a sanction under 28 U.S.C. § 1927.

LIST OF PARTIES

Catherine O. Swan, Henry J. Angelo, Willard T. Rubin, Raymond J. Tesner, Mary Milheim, Board of Education of the Warren (Ohio) City School District, Robert L. Pegues, Anthony Berarducci, Nicholas Angelo, Bart Wilson, William Haas.

Jeanne Rathbun, Alan Miles Ruben.

TABLE OF CONTENTS

	Pages
Questions Presented for Review	i
List of Parties	iii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ:	
I. The Decision Below Is In Conflict With Appli- cable Decisions Of This Court.	17
II. The Decision Below Decides Numerous Important Questions Of Federal Law Which Have Not Been, But Should Be, Settled By This Court.	22
III. The Decision Below Is In Conflict With The De- cision Of The Seventh Circuit On The Issue As To Whether Negligence As Opposed To Inten- tional Misconduct Will Support A Sanction Un- der 28 U.S.C. § 1927.	25
IV. The Decision Below So Far Departs From The Accepted And Usual Course Of Judicial Proceed- ings As To Call For An Exercise Of This Court's Power Of Supervision.	26
Conclusion	30
Appendix:	
Appendix A Opinion of the United States Court of Appeals for the Sixth Circuit in <i>In Re: Alan Miles Ruben</i> (Case No. 85-3987) and <i>Jeanne Rathbun</i> <i>vs. Warren City Schools, et al.</i> , (Case No. 85-3986)	App. 1

TABLE OF CONTENTS—Continued

	Pages
Appendix B Opinion of the United States District Court Northern District of Ohio, Eastern Division in <i>Jeanne Rathbun vs. City of Warren Board of Education, et al.</i> , (Case No. C80-1914-Y)	App. 31
Appendix C Findings of Fact and Conclusions of Law rendered by the United States District Court, Northern District of Ohio, Eastern Division in <i>Jeannne Rathbun vs. City of Warren Board of Education, et al.</i> , (Case No. C80-1914-Y)	App. 63
Appendix D Judgment of the United States Court of Appeals for the Sixth Circuit in <i>In Re: Alan Miles Ruben</i> (Case No. 85-3987) and <i>Jeanne Rathbun vs. Warren City Schools, et al.</i> , (Case No. 85-3986)	App. 73

TABLE OF AUTHORITIES

	Pages
CASES:	
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985)	29
<i>Christiansburg Garment Company v. Equal Employment Opportunity Commission</i> , 434 U.S. 412 (1978)	17, 18, 19, 20, 27
<i>City of Riverside v. Rivera</i> , — U.S. —, 106 S.Ct. 2686 (1986), at 2701, n. 4	29
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983)	27, 28
<i>Roadway Express, Inc. v. Piper</i> , 447 U.S. 752 (1980)	20, 21, 22, 24, 25, 29
<i>Westinghouse Electric Corporation v. National Labor Relations Board</i> , 809 F.2d 419 (7th Cir. 1987)	26
STATUTES:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1927	passim
42 U.S.C. § 2000e, <i>et seq.</i>	4
42 U.S.C. § 2000e-5(k)	2, 12, 29
O.R.C. § 3313.17	3, 4, 17
O.R.C. § 3313.47	3, 17
Rule 41(b), Federal Rules of Civil Procedure	9
Rule 18, Local Rules of the Sixth Circuit	9
OTHER AUTHORITIES:	
126 Cong. Rec. 22,125, Conference Report, H.R. Rep. No. 1234, 96th Cong., 2d Sess. 8 (1980)	21

The petitioners, Catherine O. Swan, Henry J. Angelo, Willard T. Rubin, Raymond J. Tesner, and Mary Milheim, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit made in this proceeding on July 30, 1987.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in *In Re: Alan Miles Ruben* (Case No. 85-3987) and *Jeanne Rathbun v. Warren City Schools, et al.* (Case No. 85-3986), filed July 30, 1987, is reported at 825 F.2d 977 (6th Cir. 1987) and is printed in Appendix A hereto, at App. 1, *infra*.

The opinion of the United States District Court, Northern District of Ohio, Eastern Division in *Jeanne Rathbun v. City of Warren Board of Education, et al.*, (Case No. C80-1914-Y), filed October 22, 1985, is unreported but is printed in Appendix B hereto, at App. 31, *infra*.

The findings of fact and conclusions of law rendered on the underlying merits of these proceedings by the United States District Court, Northern District of Ohio, Eastern Division in *Jeanne Rathbun v. City of Warren Board of Education, et al.*, (Case No. C80-1914-Y) on July 6, 1984, are unreported but are printed in Appendix C hereto, at App. 63, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 30, 1987, and this petition for writ of certiorari is timely filed. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

The following provisions of the United States Code and the Ohio Revised Code are involved in the questions presented for review:

UNITED STATES CODE

28 U.S.C. § 1927:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

42 U.S.C. § 2000e-5(k)

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and

the Commission and the United States shall be liable for costs the same as a private person.

OHIO REVISED CODE

O.R.C. § 3313.17

The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.

O.R.C. § 3313.47

Each city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character in its respective district. If the board has adopted an annual appropriation resolution, it may, by general resolution, authorize the superintendent or other officer to appoint janitors, superintendents of buildings, and such other employees as are provided for in such annual appropriation resolution.

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STATEMENT OF THE CASE

Petitioners Catherine O. Swan, Henry J. Angelo, Willard T. Rubin, Raymond J. Tesner, and Mary Milheim were named as defendants in an action brought in the United States District Court for the Northern District of Ohio, Eastern Division, in which respondent Jeanne Rathbun alleged a violation of Title VII of the Civil Rights

Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). Respondent Rathbun had been employed as a janitor by the Warren (Ohio) City School District Board of Education ("Board of Education").

Respondent Rathbun alleged that she had been discriminated against in connection with her employment on the basis of her sex and French national origin. The five individuals named in the preceding paragraph as petitioners were the elected members of the Board of Education at the time of the commencement of this litigation. For convenience of reference they will be referred to as the "individual school board member petitioners." The employing corporate Board of Education, which under Ohio law (O.R.C. § 3313.17) is a body politic and corporate capable of suing and being sued, was named as a defendant as were numerous other employees of the Board of Education. The second amended complaint alleged unlawful acts on the part of defendants individually and collectively, and specific allegations were made with respect to the school board member defendants. As determined by the district judge, the individual school board member petitioners "were named in their individual capacity." See App. B, at App. 31.

The individual school board member petitioners had not been named by Respondent Rathbun in her charge of discrimination with the Equal Employment Opportunity Commission ("E.E.O.C.") and the Ohio Civil Rights Commission ("O.C.R.C."), and neither the E.E.O.C. nor the O.C.R.C. made probable cause findings against the individual school board member petitioners. See App. A, at App. 2-3, 18. (On behalf of the five individual school board

member petitioners, a motion for summary judgment was filed in the district court seeking to dispose of the litigation with respect to those individuals. That motion was vigorously opposed in terms which left no doubt that plaintiff in fact regarded the individual school board members as defendants in addition to the corporate Board of Education. On January 24, 1983, that motion and many others were perfunctorily overruled by the second of three judges assigned to this case just two days before the case was assigned to the judge who presided over the trial and the subsequent attorney fee motions. A motion to dismiss the individual school board member petitioners for lack of jurisdiction over the subject matter was also perfunctorily overruled on January 21, 1982.)

On January 25, 1982, respondent Alan Miles Ruben entered his appearance as "additional counsel" on behalf of Respondent Rathbun. Shortly thereafter, Respondent Rathbun's attorneys sent a letter dated March 15, 1982 (signed by an attorney other than Respondent Ruben), making a settlement demand of \$54,000. That letter threatened the defendants with the prospects of a "fifteen day trial, seventeen or more depositions" and "total additional legal costs . . . estimated at well over One-hundred Thousand Dollars (sic)." The letter went on to list twenty-two individuals to be deposed in Cleveland with depositions "expected to last eight hours per day per person." In fact, no depositions were ever conducted in these proceedings by respondents. See App. B, at App. 50.

On January 5, 1983, Respondent Rathbun moved to disqualify all of the attorneys representing the various

defendants in this proceeding. Although that motion was signed by counsel other than Respondent Ruben, he was consulted on the motion during its preparation. That motion asserted that the various defense counsel had a conflict of interest because of their alleged multiple representation of defendants. See App. B, at App. 37.

The district court in its opinion filed on October 22, 1985, considered the motion to disqualify counsel in pertinent part as follows:

Specifically, the plaintiff alleged as follows:

In the case at bar there exists an *overwhelming blatant appearance of conflicting interests* between both the Defendant Board and the Board Member Defendants and as such Defendant's counsel should not only be disqualified, but should have been alert to these conflicting interests and declined multiple representation of said Defendants. [Emphasis added by the Court.]

This statement is singularly inaccurate factually and plaintiff's counsel should have been aware of the inaccuracy at the time the motion was filed.

The alleged dual representation of defense counsel of both the Warren Board of Education and the individual board members had no factual basis whatsoever. The record reflects that these defendants were represented by separate counsel. Thus, factually, the alleged conflict in representation asserted by the plaintiff simply did not exist at the time the motion was filed. All counsel involved in this action should have been aware of the actual representation of each defendant by simply reviewing the pleadings in the record.

See App. B, at App. 37-38.

The next pertinent development in the case emanated from the district court's trial notice issued on March 29, 1984. Accompanying that notice was an order requiring counsel to submit the following to the court two days prior to trial: proposed witness lists, pre-marked exhibits, proposed findings of fact and conclusions of law, and trial briefs. Although counsel for petitioners complied with that order in every respect, neither Respondent Ruben nor any other of Respondent Rathbun's attorneys complied in any regard prior to trial, nor did respondents request leave to comply until admonished by the district judge on the first day of trial. See App. B, at App. 51.

The first of four days of trial commenced in the district court on June 26, 1984. The trial proceedings were delayed that day because of the late arrival of Respondent Rathbun's counsel. When her counsel did arrive, the proceedings were further delayed while the district judge inquired as to the failure of Respondent Ruben and his co-counsel to have complied with the pretrial order. Finally, the district judge granted respondents' request for leave to file all pretrial submissions the following day. Trial then commenced with Respondent Ruben in attendance. Thereafter, Respondent Ruben was not in attendance at trial, although he never withdrew as counsel for Respondent Rathbun nor did he ever explain his absence. See App. B, at App. 52.

On the second day of trial Respondent Rathbun through her counsel filed the pretrial submissions which contained a witness list of twenty-one people. That list included the name of one man who had recently undergone

a serious heart operation and was advised by his physician to remain bed-ridden. Another name on the list was that of an individual who had died approximately eleven months prior to trial, and whose death was made part of the record in this case on September 12, 1983. See App. B, at App. 51-52.

On the third day of trial, respondents did not produce witnesses sufficient in number to occupy the district court's daily schedule, even though respondents had previously been made aware by the district judge that he expected respondents to schedule witnesses to fill that schedule. The only witnesses to have testified at that point were Respondent Rathbun, her husband, a personal friend, and a representative of the Board of Education who was monitoring the trial. Respondent Ruben's co-counsel acknowledged to the district court that none of the other witnesses on Respondent Rathbun's witness list had been subpoenaed or even notified that they might be called as witnesses. See App. B, at App. 52.

The fourth and final day of trial was summarized by the district court in its opinion filed on October 22, 1985, as follows:

The next day, [one of plaintiff's attorneys] called six witnesses who were the plaintiff's co-workers and who had been issued subpoenas the previous evening. Several of these witnesses testified that they knew nothing concerning the subject matter of this litigation, and all testified that they had very limited contact with the plaintiff. None of these witnesses had been deposed or even interviewed by plaintiff's counsel prior to testifying at trial. In fact, much of the evidence presented through these witnesses and through earlier witnesses offered by the plaintiff contrasted

sharply with the testimony offered by the plaintiff herself.

See App. B, at App. 52-53.

At the conclusion of the testimony of her witnesses, Respondent Rathbun rested. The individual school board member petitioners as well as all other defendants then moved for judgment under Rule 41(b) of the Federal Rules of Civil Procedure. Those motions were granted. The district judge then filed findings of facts and conclusions of law. See App. C, at App. 63.

Respondent Rathbun filed a notice of appeal on the merits of her claim on August 6, 1984. On September 24, 1984, the United States Court of Appeals for the Sixth Circuit dismissed that appeal for want of prosecution under Rule 18 of the Local Rules of the Sixth Circuit. A certified copy of that order was filed in the trial court on October 19, 1984. See App. B, at App. 31, 35.

The individual school board member petitioners then filed a motion for an award of attorney fees in the district court on October 30, 1987. That motion was supported by an affidavit of counsel and an itemized accounting. A second motion for attorney fees was subsequently filed on behalf of the Board of Education and other employee-defendants. The district court afforded an opportunity for briefing and conducted an oral hearing on March 15, 1985. All counsel for Respondent Rathbun including Respondent Ruben were present at that hearing. Respondent Rathbun was not present, although a brief was filed on her behalf. On October 22, 1985, the district court issued its order granting both motions for attorney fees. See App. B, at App. 31.

In the order granting fees, the district court directed the fees on behalf of the individual school board member petitioners to be paid as follows :

Respondent Rathbun	\$8,321.17
Respondent Ruben	2,500.00
Attorney Elliott Lester	2,500.00
Attorney Keith Weiner	150.00

The Board of Education and other individual defendants were awarded fees to be paid as follows :

Respondent Rathbun	\$27,838.04
Respondent Ruben	2,500.00
Attorney Elliott Lester	2,500.00
Attorney Keith Weiner	350.00

In supporting its award of fees, the district court wrote thirty-three pages reviewing the facts and analyzing the pertinent case law and statutory authority. The opinion of the district court stated in part as follows :

In essence, both of plaintiff's attorneys' preparation and performance at trial were less than professional, to say the least. Although the plaintiff brought this action against five individual school board members and several individual employees of the school systems, the record is totally devoid of any evidence involving these people. In fact most of the individual defendants' names, identities, employment or official positions were never mentioned by any witness including the plaintiff, nor do these defendants' names appear in any exhibit offered by the plaintiff. Instead, the record establishes only that these individual defendants had the misfortune of being so named and were therefore forced to defend this law-

suit. It is clear to the court that under the facts and circumstances found in the record, the filing and prosecution of this action against all of the individual defendants was a frivolous and unwarranted act as defined in *Christiansburg*. Further, this court can only reach one conclusion regarding the purpose of this filing and prosecution by the plaintiff and her counsel as it relates to the individual defendants. That conclusion is that the plaintiff, from the inception of this action and her counsel from the time they entered appearances in this case, acted with the intent to extract some monetary settlement from several individuals associated with the school system because of the threat of defending and expense of litigating this action, even though the plaintiff had no evidence either direct or circumstantial of any wrongdoing or liability on the part of these individual defendants. The actions on the part of Mrs. Rathbun, Mr. Lester and Mr. Ruben of bringing and prosecuting unfounded charges of intentional discrimination against the innocent individual defendants are totally contradictory to the legislative purpose of Title VII and the other civil rights laws of this country. Under such circumstances, as heretofore described, the court finds that the plaintiff, Mr. Lester and Mr. Ruben have all acted without requisite good faith by charging and prosecuting the individual defendants when they neither had nor produced a single thread of evidence against these defendants. Further, the testimony of the plaintiff herself clearly demonstrated that she had no evidence whatsoever which would indicate any discriminatory or unlawful action on the part of those individuals.

The activities of counsel previously described, together with the posture taken by plaintiff herself, present an unparalleled example of an abusive use of the system of justice in the civil rights area. Such an abuse of Title VII and conduct of counsel can not be

tolerated by this court. Hence, this court shall award appropriate fees against each of the parties involved.

See App. B, at App. 53-56.

The district court relied upon 42 U.S.C. § 2000e-5(k) and its inherent power in awarding fees against Respondent Rathbun. It relied upon its inherent power and arguably 28 U.S.C. § 1927 in awarding fees against Respondent Ruben.

Respondent Rathbun and Respondent Ruben appealed the award of attorney fees against them to the United States Court of Appeals for the Sixth Circuit. Respondent Rathbun's other attorneys who were subject to the award of fees did not appeal. With regard to Respondent Rathbun, the court of appeals reversed the award of attorney fees and remanded to the district court for further proceedings with respect to her liability for "defendants' costs." With regard to Respondent Ruben, the court of appeals reversed and remanded to the district court to "require defendants' attorneys to amend their motions to identify the claimed misconduct by Ruben and the extra efforts required by them as a result." See App. A, at App. 30.

The court of appeals found that the standard for its review was "whether the district judge abused his discretion in awarding attorneys' fees." See App. A, at App. 14. However, the court of appeals then proceeded to conduct what can only be categorized as a *de novo* review, substituting its analysis of the record for that of the district judge rather than reviewing the record to determine whether there was any basis to support the conclusions of the district judge.

On the issue of attorney fees with regard to Respondent Rathbun, the court of appeals acknowledged that briefs were filed in the district court on that issue in her behalf and that her counsel attended the hearing. Nevertheless, the court of appeals procedurally held that:

The imposition of attorneys' fees against Rathbun must be reversed if only because she never had an adequate opportunity for a hearing on the record.

See App. A, at App. 15.

In its analysis of the substantive aspects of the attorney fees issue with regard to Respondent Rathbun, the court of appeals chose to inquire as to whether there was any basis to support Respondent Rathbun's subjective belief in her case as opposed to whether there was any basis to support the exercise of the discretion of the district judge. The court of appeals reasoned in pertinent part as follows:

Rathbun was not completely unjustified in believing she was the subject of discrimination and a sexually harassing and abusive work environment. There is no evidence that Rathbun knew that the individual school board members . . . could not be held liable for acts of discrimination. . . .

As discussed above, here there is no evidence that Rathbun was aware that the individual school board members—again, assuming she sued them in their individual capacity, an assumption on which the district judge proceeded—could not be held legally responsible for conduct of her fellow employees. She had some foundation for believing that she had been discriminated against either on the basis of her sex or French origin. Combined with the advice of her original attorneys that she had a claim against the individual school board members and the subsequent encouragement by an attorney and law professor to pursue these claims further, Rathbun certainly had a

sufficient basis for continuing her claims against the individual defendants.

See App. A, at App. 17, 19.

Although the court of appeals acknowledged that there had been no probable cause finding issued by the Ohio Civil Rights Commission against the individual school board member petitioners, it did not give any consideration in its opinion to the district court's finding that the record was "totally devoid of any evidence" involving the individual school board member petitioners. See App. A, at App. 18; App. B, at App. 53.

The court of appeals then focused on the award of attorney fees against Respondent Ruben, a law professor at Cleveland State University. The court of appeals held as follows:

The probable cause finding of the [Ohio Civil Rights Commission] also precludes a finding that Ruben *entered* the action in bad faith. *** To the contrary, Rathbun's statements were corroborated by the OCRC's finding that other evidence supported a discrimination action. Ruben, like Rathbun, was justified in relying on this fact.

See App. A, at App. 21.

On this point the court of appeals did not take into account the fact that no probable cause finding was made by the Ohio Civil Rights Commission against the individual school board member petitioners.

The court of appeals then reasoned circuitously as follows:

The school board members later moved for summary judgment on the ground that they were not "employers" under Title VII and that the district court lacked jurisdiction over them because Rathbun failed to

name them in the EEOC charge. These motions were denied in January of 1983.

The denial of the motions for summary judgment precludes a sanction on the ground that the claims against them were *legally* insufficient.

Since none of the above motions was predicated on the underlying facts, the denial of the motions did not preclude the district judge from imposing sanctions if the case was *factually* frivolous. The order imposing sanctions makes it clear, in fact, that it was not the *legal* insufficiency of the complaint that lead to the sanctions but the lack of *factual* support for the case. We have, however, already rejected a factual predicate for sanctioning Ruben.

See App. A, at App. 22-24.

The reference by the court of appeals to its prior rejection of the factual predicate for sanctioning Respondent Ruben is to the previously quoted portion of the opinion in which the court of appeals held that Respondent Ruben was entitled to rely on the probable cause finding of the Ohio Civil Rights Commission. However, no such finding was ever made pertaining to the individual school board member petitioners. See App. A, at App. 18.

As to the issue of whether Respondent Ruben engaged in bad faith misconduct in the course of the litigation, the court of appeals remanded to the district court for reconsideration in accordance with various legal standards announced by the court of appeals. Those standards, which significantly impact upon the discretion of the district court, consist of the following:

Proceeding to trial upon inadequate evidence may lead to a sanction under 28 U.S.C. § 1927. However,

while an attorney may be sanctioned for not acquiring facts necessary to rebut his good faith belief that the case warranted prosecution, inadequate pretrial preparation by itself (contrary to the district judge's suggestion) cannot justify a conclusion that Ruben pursued the case in bad faith. [Citations omitted.]

See App. A, at App. 26, footnote 11.

As an attorney of record, Ruben could be held accountable for failure to take discovery or comply with pretrial orders. However, we think that the district judge's willingness to accept trial materials one day later, without imposing a sanction at the time, precluded him from later sanctioning Ruben for this delinquency. [Citations omitted.]

See App. A, at App. 26-27, footnote 12.

A district judge should not await the aggregation of what he considers multiple acts of misconduct and then levy an aggregated sanction without at least warning the attorneys at the time of each act or reserving decision upon timely requests by opposing counsel.

See App. A, at App. 28.

Finally, the Court of Appeals imposed the exact same grounds for sanctions under both the inherent power of the federal judiciary and 28 U.S.C. § 1927:

Discrete acts of vexatious conduct should be identified and a determination made whether they were done in bad faith or, even if bad faith was not present, whether they multiplied the proceedings pursuant to 28 U.S.C. § 1927. Because the district judge did not analyze the impact upon defendants of discrete acts of claimed misconduct, remand is necessary to allow the district judge to make such a determination.

See App. A, at App. 28.

In arriving at its decision, the court of appeals did not review the record to determine whether there was any basis to support the exercise of the district judge's discretion in awarding sanctions. Rather, the court of ap-

peals reviewed the record with a view toward seeking to identify some basis for concluding that the case was neither frivolous nor conducted in bad faith. It is from this decision that the individual school board member petitioners pray for the issuance of a writ of certiorari.

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REASONS FOR GRANTING WRIT

I. The Decision Below Is In Conflict With Applicable Decisions Of This Court.

The decision of the United States Court of Appeals for the Sixth Circuit in reversing the award of attorney fees in favor of the five individual school board member petitioners and against Respondent Rathbun and her counsel, Respondent Ruben, cannot be reconciled with the previous decisions of this Court in *Christiansburg Garment Company v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978) and *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

The individual school board member petitioners happened to be the elected members of the corporate Board of Education at the time of the commencement of this litigation. Under Ohio law, Respondent Rathbun's contract of employment was with the corporate Board of Education, not the individual school board member petitioners. The corporate Board of Education was a separate legal entity capable of being sued. O.R.C. §§ 3313.17, 3313.47.

It is critical to note that Respondent Rathbun never mentioned any of the names of the individual school board member petitioners in her entire testimony at trial, occupying 300 pages of the record. Respondent Rathbun did not produce even a scintilla of evidence of discrimination pertaining to the individual school board member petitioners. Indeed, no effort was made to establish when these indi-

vidual school board members served on the Board of Education so as to link them even tangentially to events about which Respondent Rathbun complained.

A

Against that backdrop, the district judge analyzed this Court's decision in *Christiansburg Garment* and its progeny. After devoting a considerable portion of his thirty-three page opinion to the facts of the case, the district judge made a specific finding that the filing and prosecution of the action against the individual school board members was frivolous and unwarranted as defined in *Christiansburg Garment*. See App. B, at App. 53. The district court also went further to expressly find that Respondent Rathbun and Respondent Ruben "acted without requisite good faith by charging and prosecuting the individual defendants when they neither had nor produced a single thread of evidence against these defendants."

In *Christiansburg Garment* this Court opined in pertinent part as follows:

A fair adversary process presupposes both a vigorous prosecution and a vigorous defense. It cannot be lightly assumed that in enacting § 706(k), Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show it was brought in bad faith.

If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis.

In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, *even though not brought in subjective bad faith*. [Emphasis added.]

And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.

Id., at 419-422.

Given the fact that there was no evidence offered by respondents to indicate any discriminatory or unlawful action on the part of the individual school board member petitioners, it is astounding that the court of appeals could have ignored that fact and reversed the district court pertaining to these petitioners in light of *Christiansburg Garment*. Nevertheless that is precisely what happened.

Instead of properly focusing on the inquiry as to whether there was any basis in the record to support the district judge's finding that the case was frivolous against the individual school board member petitioners, the court of appeals engaged in a subjective bootstrap analysis as to what Respondent Rathbun was entitled to believe:

As discussed above, here there is no evidence that Rathbun was aware that the individual school board members . . . could not be held legally responsible for conduct of her fellow employees. She had some foundation for believing that she had been discriminated against either on the basis of her sex or French origin. Combined with the advice of her original attorneys that she had a claim against the individual school board members and the subsequent encouragement by an attorney and law professor to pursue these claims further, Rathbun certainly had a sufficient basis for

continuing her claims against the individual defendants.

See App. A, at App. 19-20.

This Court's decision in *Christiansburg Garment* stands for the proposition that the plaintiff's subjective bad faith is not controlling under 42 U.S.C. § 2000e-5(k). The proper analysis is whether the case in fact *was* frivolous, unreasonable, or without foundation, not whether the plaintiff *regarded* the case as meritorious.

Simply put, the court of appeals analysis cannot pass muster under the standard espoused in *Christiansburg Garment*.

B

The court of appeals decision in this case also conflicts with this Court's analysis of the inherent power of the federal judiciary to assess attorney fees as a sanction against counsel. In *Roadway Express, supra*, at 766-767, this Court held:

The power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But in a proper case, such sanctions are within a court's powers.

•••

Similarly, the trial court did not make a specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers.

[Citations and footnotes omitted.]

The district judge in this instance did make a specific finding that Respondent Ruben acted in bad faith. See App. B, at App. 54. The judge recited at length the areas of counsel misconduct for which Respondent Ruben was responsible as an attorney of record, and as previously noted he emphasized that no evidence was presented against the individual school board member petitioners.

The district judge completely satisfied the standard espoused in *Roadway Express* in the discretionary exercise of the district court's inherent power. Yet the court of appeals chose to apply its own standard in requiring separate warnings by the district judge as a condition precedent to the imposition of sanctions. See App. A, at App. 28.

This Court did not require any such warnings in *Roadway Express*. In addition, and at least equally as important, when 28 U.S.C. § 1927 was amended in response to *Roadway Express* so as to specifically include attorney fees, the Congress specifically rejected any such warning requirement:

The amendment to section 1927 is one of several measures taken in this legislation to deter unnecessary delays in litigation. The purpose of deterring delay would be more effectively achieved if judges warn attorneys in anticipation of a violation of section 1927 rather than simply waiting for violations to occur and imposing the sanctions provided. *However, the managers decided not to require a warning as a matter of law because a violation might not necessarily be committed in the presence of the judge and because such a requirement might be viewed as license to engage in dilatory conduct until such warning is given. Such a requirement would thus have a counterproductive effect.* [Emphasis added.]

126 Cong. Rec. 22,125, Conference Report,

H.R. Rep. No. 1234, 96th Cong., 2d Sess. 8 (1980).

The court of appeals also held that the district judge could not impose sanctions under this court's inherent power without examining whether *discrete acts* were done in bad faith and analyzing the *impact of such discrete acts upon the defendants*. See App. A, at App. 28. Here again, the court of appeals is requiring more than the standard set forth in *Roadway Express*.

Moreover, the court of appeals ignores the finding by the district court that because there was *no evidence* against the individual school board member petitioners, respondents' actions as to them were "without requisite good faith" from the "inception of this action" with regard to Respondent Rathbun and from the time he entered his appearance with regard to Respondent Ruben. See App. A, at App. 53-54. The court of appeals rejected the notion that Respondent Ruben could be sanctioned because the case was factually frivolous, relying on the finding of probable cause by the O.C.R.C. However, that finding was never made with respect to the individual school board member petitioners. See App. A, at App. 18.

The district court decision is consistent with *Roadway Express*. The court of appeals decision is not.

II. The Decision Below Decides Numerous Important Questions Of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

This case directly presents at least four important issues which have not been addressed previously by this Court. The resolution of these issues is important not only for the interests of the litigants in the case at bar but also for the proper functioning of the federal judiciary in the administration of the courts throughout the Nation.

A

First, the court of appeals would limit the discretionary exercise of the inherent power of a district judge by requiring an analysis of the financial impact of attorney misconduct upon the opposing party. See App. A, at App. 28-29. Such a requirement is untenable and should not pass unquestioned by this Court.

For instance, in some circumstances, the blatant disregard of court rules by counsel and the totally inadequate preparation for trial could actually result in a favorable financial impact on the opposing party. Yet who could seriously doubt the inherent power of the district judge to impose sanctions so as to preserve the integrity of and foster respect for the judicial process.

B

Second, the court of appeals held that:

A district judge should not await the aggregation of what he considers multiple acts of misconduct and then levy an aggregated sanction without at least warning the attorney at the time of each act or reserving decision upon timely requests by opposing counsel.

See App. A, at App. 28.

However, as previously discussed herein, a warning requirement has never been imposed by this Court, and the Congress has expressly rejected the concept. Indeed, in addition to the problems previously noted, an appellate court is seldom in a position to be aware of each dialogue between the bench and the bar during the course of a legal proceeding. Those exchanges are frequently not made on the record. Prudence dictates the wisdom of admonishing counsel off the record in many litigation settings.

A warning requirement is unworkable, counterproductive and should not pass unquestioned by this Court.

C

Third, counsel is unaware of any occasion which this Court has had to previously consider the implications of an attorney fees sanction hearing at which a litigant and the litigant's counsel are both parties against whom sanctions are sought. The court of appeals held that precisely because of that fact, Respondent Rathbun "never had an adequate opportunity for a hearing on the record." The precedent relied on was this Court's decision in *Roadway Express*. See App. A, at App. 15. The court of appeals reached this holding albeit acknowledging that briefs were filed on Respondent Rathbun's behalf.

Not only do the facts contradict the court of appeals holding on this issue, but it is quite doubtful that any district court should be reversed for having failed to advise a litigant in Respondent Rathbun's position to seek separate counsel for a sanction hearing.

It is submitted that Respondent Rathbun did have an *opportunity* to be heard. Like any litigant, she must be responsible for her own choices and decisions in the litigation proceeding. Like any litigant in her position, she had the right to choose as to whether she personally appeared at the hearing and whether she retained independent counsel. That choice is not within the control or influence of the district court or opposing parties.

The holding in this case that Respondent Rathbun did not have an adequate opportunity for a hearing without articulating any further guidance sets a very dangerous precedent in an area where this Court has not spoken.

D

Fourth, this case presents an issue as to the proper standard for allocating an award of attorney fees against

a litigant and several co-counsel where the requisite findings under *Christiansburg Garment* and *Roadway Express* have been made. Here again, the court of appeals would afford little or no discretion to the district judge who lived with the case and was most familiar with the proceedings. Instead, the court of appeals would require the district court to inquire into discrete acts of misconduct by Respondent Ruben and measure the impact of each act on the opposing litigant.

It is respectfully submitted that the standard set forth by the court of appeals simply will not work where there are multiple counsel of record representing the same litigant. For instance, it will be impossible to attach a specific percentage of responsibility to Respondent Ruben for his role in the discrete act of failing to produce even a scintilla of evidence against these individual school board member petitioners.

There are times when a judge must exercise discretion in making a judgment call. Precision of measurement may not be possible. In cases such as this involving sanctions against multiple counsel and their client, the judicial system must put its faith in the discretion of the trial judge who is in the best position to make that call. This Court should take this opportunity to so hold.

III. The Decision Below Is In Conflict With The Decision Of The Seventh Circuit On The Issue As To Whether Negligence As Opposed To Intentional Misconduct Will Support A Sanction Under 28 U.S.C. § 1927.

In the case at bar, the Sixth Circuit reaffirmed that "simple inadvertence or negligence that frustrates the trial judge will not support a sanction under section 1927." See App. A, at App. 13. However, the United States Court

of Appeals for the Seventh Circuit has indicated a willingness to impose sanctions under 28 U.S.C. § 1927 where only negligence was present.

In *Westinghouse Electric Corporation v. National Labor Relations Board*, 809 F.2d 419 (7th Cir. 1987), attorneys violated the pertinent rules governing margin and spacing specifications for typed briefs so as to accommodate the limitation on the brief length. The Seventh Circuit awarded a sanction premised as follows:

We cannot exclude the possibility that all of this was simply negligent inattention to the appellate rules. . . . Even if only negligence was at work, counsel must learn to be alert. The offense here "multiplied the proceedings" by requiring the judges and counsel for the Board to examine two sets of briefs for Westinghouse. We accordingly use our power under 28 U.S.C. § 1927 and impose a penalty of \$1,000. Counsel may not pass this penalty on to Westinghouse.

Id., at 425.

IV. The Decision Below So Far Departs From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power of Supervision.

It is respectfully submitted that the district judge painstakingly exercised his discretion in analyzing the facts of the case and the misconduct of counsel, and made the requisite findings under the applicable case law handed down by this Court. Yet although the court of appeals gave lip service to an abuse of discretion standard for review, the district court was afforded absolutely no deference and allowed no discretion.

The court of appeals should have reviewed the record to see if there was any basis upon which to uphold the findings of the district judge. Certainly that is the accepted and usual course for judicial proceedings where

abuse of discretion is the standard for review. Instead the court of appeals substituted its judgment for that of the district court. The reviewing court searched the record to attempt to find some basis to vindicate the respondents. That endeavor is abhorrent to the dignity and wisdom of the federal trial bar and insulting to those participants in the process who breathed life into the record.

This case is ripe for the corrective, supervisory powers of this Court. It is clear that this Court intends for decisions regarding attorney fee sanctions to be made in the sound discretion of the district judge on the basis of certain express findings. *Christiansburg Garment, supra*, at 421. To permit the court of appeals in this case to reverse and remand for further proceedings without ever expressly finding an abuse of discretion will be to encourage further appeals in attorney fees cases across the Nation.

The matter was strikingly articulated in a separate opinion of four of the Justices in *Hensley v. Eckerhart*, 461 U.S. 424, 442 (1983) as follows:

Vacating a fee award such as this and remanding for further explanation can serve only as an invitation to losing defendants to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees, after the merits of a case have been concluded, when the appeals are not likely to affect the amount of the final fee. Such appeals, which greatly increase the costs to plaintiffs of vindicating their rights, frustrate the purposes of § 1988. Where, as here, a district court has awarded a fee that comes within the range of possible fees that the facts, history, and results of the case permit, the appellate court has a duty to affirm the award promptly.

The foregoing quotation applies with equal force to successful defendants in frivolous cases prosecuted and con-

ducted in bad faith who are awarded fees by district courts under any applicable authority.

The same separate opinion in *Hensley, id.*, at 454-455, goes on to state:

To remain faithful to the legislative objectives of § 1988, appellate courts, including this Court, should hesitate to prolong litigation over attorney's fees after the merits of a case have been concluded. . . . Paragraph-by-paragraph scrutiny of the explanations for specific exercises of the district courts' broad discretion under § 1988 serves no productive purpose, vindicates no one's civil rights, and exacerbates the myriad problems of crowded appellate dockets.

If a district court has articulated a fair explanation for its fee award in a given case, the court of appeals should not reverse or remand the judgment unless the award is so low as to provide clearly inadequate compensation to the attorneys on the case or so high as to constitute an unmistakable windfall. . . . More exacting review, for which there is no clear mandate in the statute or its legislative history, frustrates rather than advances the policies of § 1988.

In systematic terms, attorney's fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases. . . . Regular appellate scrutiny of issues like those in this case also generates a steady stream of opinions each requiring yet another to harmonize it with the one before or the one after. Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentional way through the legal landscape leaving waste and confusion (not to mention circuit splits) in its wake. [Citations and footnotes omitted.]

The court of appeals decision in the case at bar presents the same deviant judicial behavior and policy concerns expressed above relative to 28 U.S.C. § 1927, 42

U.S.C. § 2000e-5(k) and the inherent power of the federal courts. A reviewing court cannot reverse the findings of the trier of fact simply because it is convinced it would have decided the matter differently. *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

The district court in this case made the requisite legal findings to support the award of attorney fees and explained the factual basis for those findings in detail. The failure of the court of appeals to defer to the district judge's sound exercise of discretion in this case will tip the all too delicately balanced federal scales of justice in this Nation in favor of frivolous claims brought solely to exact monetary settlements and fee awards.

This Court has recognized the congressional intent to encourage suits by victims of discrimination while deterring frivolous litigation. *Roadway Express, supra*, at 762. If this case is permitted to become law, that congressional purpose will have been frustrated. At least in the Sixth Circuit, plaintiff's counsel will be able to defy court rules and present absolutely no evidence against various parties irresponsibly named as defendants; and yet there will be no fear of being sanctioned for having prosecuted a frivolous case or for having acted in bad faith.

The dockets of the federal courts in this Nation are already crowded with cases. The filings of civil rights cases are on the rise. *City of Riverside v. Rivera*, — U.S. —, 106 S.Ct. 2686 (1986), at 2701, n. 4. Cases without merit are abundant in numbers, making it difficult for the federal courts to give timely consideration to those cases with merit. "The glacial pace of such litigation breeds frustration with the federal courts and, ultimately, disrespect for the law." *Roadway Express, supra*, at 757, n. 4.

It is respectfully submitted that this Court should exercise its supervisory power to correct the misguided course charted by the court of appeals in this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

Nos. 85-3986/3987

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: ALAN MILES RUBEN,)

Attorney-Appellant, (85-3987))

JEANNE RATHBUN,)

Plaintiff-Appellant, (85-3986))

v.)

WARREN CITY SCHOOLS, ROBERT L.)

PEGUES, CATHERINE O. SWAN,)

HENRY J. ANGELO, WILLARD T.)

RUBIN, RAYMOND J. TESNER,)

MARY MILHEIM, ANTHONY R.)

BERARDUCCI, NICHOLAS J. ANGELO,)

BART WILSON, WILLIAM HAAS,)

STEVE HUDOCK, and)

BERNIE WILSON,)

Defendants-Appellees.)

ON APPEAL from the
United States Dis-
trict Court for the
Northern District
of Ohio.

Decided and Filed July 30, 1987

Before: WELLFORD and NORRIS, Circuit Judges;
and COHN, District Judge.*

*Honorable Avern Cohn, United States District Court for the
Eastern District of Michigan sitting by designation.

COHN, District Judge. This appeal raises questions about the propriety of sanctions against a plaintiff and one of her attorneys arising out of a sex and national origin discrimination case filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* For the reasons that follow, we reverse the sanctions against plaintiff and her attorney and taxation of costs against plaintiff and remand the case for further consideration by the district judge.

I. STATEMENT OF THE CASE

Plaintiff, Jeanne Rathbun, is a naturalized citizen of the United States of French origin. She worked as a janitor at several school buildings in the Warren, Ohio public school system from 1973 to the time she filed the underlying action in 1980, including East Junior High School ("East"), Warren G. Harding High School ("Harding") and Devon Elementary School ("Devon"). Throughout this period, she alleged that she was denied overtime equal to male janitors and was subjected to physical and verbal abuse and disparate workloads. She claimed a retaliatory transfer from East to Harding in September of 1974 and a retaliatory transfer again in May of 1978 to Devon on account of her complaints of discrimination.

Rathbun filed a charge with the Ohio Civil Rights Commission ("OCRC") in September of 1978, alleging sex discrimination against "Warren City Schools" only and mentioning acts by Bart Wilson, a foreman of custodians and janitors; William Haas, head custodian of the

¹Defendant's proper name appears to be Warren City School District Board of Education.

school system; and Steve Hudock, assistant head custodian of the school system. Rathbun also filed a charge with the Equal Employment Opportunity Commission ("EEOC") in October of 1978, again alleging sex discrimination by "Warren City Schools" only. The EEOC charge likewise mentioned Wilson, Haas, and, additionally Nicholas Angelo, athletic director and then supervisor of business operations for the school system, but it did not mention Hudock. (Rathbun did not complain in the EEOC charge about her time at East Junior High, and there is only an oblique reference to this period in the OCRC charge.)

In March of 1979, the OCRC found probable cause that Rathbun's allegations established a case of sex and national origin discrimination at each of the three buildings she had worked at. The finding was accompanied by a four-page summary of evidence based largely on interviews with Rathbun's co-workers. The EEOC declined to pursue Rathbun's charge and issued a right-to-sue letter in July of 1980. On the basis of the OCRC's attempts at conciliation, the Warren school board offered to allow Rathbun to transfer to any one of twenty-two job sites, including return to Harding. Rathbun refused to work elsewhere, and she declined the jobs offered at Harding in the belief that the jobs would be more strenuous than her old job. In declining the conciliation offers, Rathbun relied on the advice of her then attorneys—Shenyey, Berman & Abakumov.

Shenyey, Berman & Abakumov filed this case on October 16, 1980, within ninety days after Rathbun received the EEOC's right-to-sue letter. The individual defendants named were: the superintendent of the Warren

App. 4

City School District at the time of suit (Robert Pegues); the assistant superintendent at the time of suit (Anthony Berarducci); the five members of Warren City School District Board of Education ("the school board defendants") at the time of suit (Catherine Swan, Henry Angelo, Willard Rubin, Raymond Tesner, and Mary Milheim), named in their "representative capacity"; Nicholas Angelo; Bart Wilson; Haas; Hudock; and a fellow janitor, Bernie Wilson.

Shenyey, Berman & Abakumov withdrew from the case in 1981. Defendants do not dispute that the withdrawal was unrelated to the merits of the case. Attorney Elliott Lester substituted as Rathbun's attorney and pursued the case through trial. Because of Lester's inexperience in Title VII cases, in January of 1982 he sought the assistance of appellant Alan Miles Ruben, a law professor from Cleveland Marshall College of Law. Ruben entered his appearance as "additional counsel" and, according to Lester, provided academic guidance only. The record reflects, however, that Ruben's role was actually more extensive. Lester also used a newly licensed associate, Keith Weiner, on the case for a year beginning in September of 1982.

After Rathbun's presentation of her case-in-chief over four days of trial, the district judge granted defendants' motion to dismiss on June 29, 1984. Fed. R. Civ. P. 41(b). Findings of facts and conclusions of law² were filed July

²The district judge's findings of fact and conclusions of law, Fed. R. Civ. P. 52(a), total 11 pages. While he determined that Rathbun's case lacked factual and legal support, he did not characterize her case as "frivolous" or intimate that it was instituted or prosecuted in bad faith.

6, 1984; the order of dismissal was entered July 10, 1984. Rathbun filed a notice of appeal on August 6, 1984; the appeal was dismissed for want of prosecution on September 24, 1984. The mandate was filed with the district court on October 19, 1984.

The school board defendants filed a motion for attorneys' fees from Rathbun and her attorneys on various legal grounds on October 30, 1984. The other defendants filed a similar motion on January 9, 1985. The district judge held a hearing on the motions on March 15, 1985, at which Lester, Weiner, and defendants' attorneys argued. Ruben was present at the hearing; an attorney argued on his behalf. Although briefs were filed on Rathbun's behalf in opposition to the motions,³ no one argued her position at the March 15 hearing.

On October 22, 1985, the district judge entered an order and opinion granting defendants' motions. Weiner was sanctioned \$500 under Federal Rule of Civil Procedure 11 for filing a motion not well grounded in fact; he does not appeal. Lester was sanctioned \$5,000; he also does not appeal.⁴ Ruben likewise was sanctioned \$5,000. While the district judge's opinion does not clearly delineate the legal grounds for sanctioning Ruben, his opinion mentions Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, and a judge's inherent power to punish bad faith

³While the opinion awarding attorneys' fees states that no briefs were filed on Rathbun's behalf (Order at 2), the record contradicts this statement (see R. 123, 124).

⁴It appears from the record that Lester is no longer a member of the Ohio bar.

conduct during litigation. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-67 (1980). The bulk of the sanction—\$36,159.21—fell on Rathbun. Again, while the district judge did not clearly delineate the legal grounds for sanctioning Rathbun, the opinion offers alternative grounds. Like Ruben's sanction, the first ground cited for the sanction against Rathbun in the inherent power to punish bad faith litigation. The second ground described by the judge was that Rathbun's case was "frivolous, unreasonable, or without foundation. . . ." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (interpreting § 706(k) of Title VII, 42 U.S.C. 2000e-5(k)). The district judge also taxed costs against Rathbun.

II. TIMELINESS OF THE MOTIONS FOR ATTORNEYS' FEES

The school board defendants filed their motion almost four months after the district judge's findings of fact and conclusions of law and almost three months after the notice of appeal. The motion followed the dismissal of the appeal by less than two weeks. The other defendants filed their motion little more than two months later. There is no local rule in the Northern District of Ohio limiting the time period for the filing of a motion for attorneys' fees. The parties agree that instead of a strict time measure, the test is one of "reasonableness." They dispute the proper milestone for measuring the period and whether the motions here were filed within a "reasonable" time.

The district judge considered the timeliness issue in granting the motions, relying primarily on *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445 (1982). There, the Supreme Court upheld an award of attorney's

App. 7

fees under 42 U.S.C. § 1988 where the motion for attorney's fees was filed four-and-one-half months after the entry of final judgment. The Supreme Court held that the entertainment of such a motion is within the discretion of the district court, which should consider unfair surprise or prejudice to the affected party and the policy of avoiding piecemeal appeals. 445 U.S. at 454.

Ruben argues that the district judge lacked jurisdiction to consider the attorneys' fee motions after Rathbun's appeal was dismissed, relying primarily on *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789 (7th Cir. 1983). There, a motion for attorneys' fees under 28 U.S.C. § 1927 filed eight months after dismissal and two months after affirmance was held to be untimely. The *Overnite* court did not, however, overrule or limit two earlier cases requiring the filing of such a motion only within a "reasonable" time and, if there is an appeal on the merits, before or during the pendency of the appeal. *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577 (7th Cir. 1981); *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980).

The district judge properly rejected Ruben's reliance on *Overnite*. Unlike the appeal in *Overnite*, the appeal here was pending for only a brief time before it was dismissed due to inaction by Rathbun and her attorneys. Cf. *In re Itel Sec. Litig.*, 791 F.2d 672 (9th Cir. 1986) (attorney cannot destroy district court's jurisdiction to impose sanctions by withdrawing from case before appeal perfected or while appeal pending), *cert. denied sub nom. Bader v. Itel Corp.*, 107 S. Ct. 880 (1987). The district judge noted that the attorneys' fee motions should not have surprised Rathbun and her attorneys in light of the course of the discovery and trial proceedings. Finally, finding that the mo-

tions here were timely filed does not result in piecemeal appeals, since this is the only appeal perfected in this case. We are not asked to reconstruct a case previously reviewed in detail. There is no prejudice to Rathbun and Ruben because the litigation is not being renewed after an appeal on the merits that could have been consolidated with the appeals of the sanctions. *See Obin v. Dist. No. 9 of Intern. Ass'n of Machinists & Aerospace Workers*, 651 F.2d 574, 583-84 (8th Cir. 1981). Ruben's claimed failure to be apprised of the status of the appeal on the merits must be disregarded as his failure to be aware of the actions of Lester, his co-counsel. *See Shea v. Donohoe Constr. Co., Inc.*, 795 F.2d 1071, 1074 n.3 (D.C. Cir. 1986).

We also find support for holding the motions were timely filed in *Fulps v. City of Springfield, Tenn.*, 715 F.2d 1088 (6th Cir. 1983). Discussing both *White* and *Obin*, there we allowed a party to seek attorneys' fees eight months after the entry of judgment by the district court if the delay did not prejudice the opposing party, thus requiring an equitable bar on the ground of laches. *Id.* at 1095-96. While Ruben argues that he was prejudiced, the delay here was shorter than that allowed in *Fulps*, and Ruben does not show that he changed his position or detrimentally relied upon the delay in the filing of the motions.

Ruben also argues that *White* is inapplicable because the only statutory basis for an award of attorneys' fees against him is section 1927, whereas section 1988 was the relevant statute in *White*. We reject this argument. Ruben should have known that defendants, as the prevailing parties, could seek recovery of their attorneys' fees under

42 U.S.C. § 2000e-5(k), the language of which parallels section 1988 and therefore falls within the *White* rationale. To require a defendant to seek attorneys' fees from an attorney immediately after judgment, but allow additional time under *White* to seek recovery of attorneys' fees from a plaintiff, would only exacerbate the problem of piecemeal appeals.

As the Supreme Court noted in *White*, 455 U.S. at 454 & n.16 and 456 (Blackmun, J., concurring), the issue of timeliness of a motion for attorneys' fees can be avoided by the adoption of a local rule establishing a timeliness standard. We have previously encouraged the adoption of such local rules. See *Fulps*, *supra*, 715 F.2d at 1096. See Local Rule 17(n) of the Eastern District of Michigan.

III. STANDARDS FOR SANCTIONS

A. Standards for District Judges

The district judge recited four grounds in sanctioning plaintiff and her attorneys: (1) inherent power; (2) 28 U.S.C. § 1927; (3) Federal Rule of Civil Procedure 11; and (4) 42 U.S.C. § 2000e-5(k). An elaborate discussion of the standard for each of these grounds is not necessary. A good discussion of the first three grounds appears in *Oliveri v. Thompson*,⁵ 803 F.2d 1265, 1271-75 (2d Cir. 1986), *cert. denied sub nom. County of Suffolk v. Graseck*, 107 S. Ct. 1373 (1987). See generally *Johnson & Cassady, Frivolous Lawsuits and Defensive Responses to Them—*

⁵To the extent we disagree with the *Oliveri* court's "bad faith" requirement for sanctions under 28 U.S.C. § 1927, we discuss below the standard for such determinations in this circuit.

What Relief is Available?, 36 Ala. L. Rev. 927 (1985); Comment, *Courts Are No Place for Fun and Frivolty: A Warning to Vexatious Litigants and Over-Zealous Attorneys*, 20 Williamette L. Rev. 441 (1984).

As the *Oliveri* court noted, the different grounds for awarding sanctions and shifting attorneys' fees are distinct and require a close and careful analysis. Although the district judge mentioned the various grounds, it is just not clear which of the various grounds was the basis of the sanction against Rathbun and Ruben. We therefore consider each of the grounds advanced by the district judge and briefly set forth the differences between them.

1. "Bad Faith"

A district judge has inherent equitable power to award attorneys' fees for "bad faith" or frivolous conduct of a case. See, e.g., *Roadway Express, supra*, 447 U.S. at 765-67 (citing *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977)). This power extends to parties as well as attorneys. *Oliveri, supra*, 803 F.2d at 1272; *Jones v. Continental Corp.*, 789 F.2d 1225, 1229 (6th Cir. 1986). We have discussed the "bad faith" rule at length in *Shimman v. International Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1228-30 & nn. 5, 6 (6th Cir. 1984) (collecting cases), *cert. denied*, 469 U.S. 1215 (1985).

There are only two aspects of the "bad faith" rule implicated by the district judge's opinion imposing sanctions here—"(1) bad faith occurring during the course of the litigation; [and] (2) bad faith in bringing[the] action or causing [the] action to be brought. . . ." *Shimman*, 744

F.2d at 1230. The district judge did not clearly delineate which of these two grounds supported the sanctions against Rathbun and Ruben, respectively. As we note below, however, the only plausible ground for a bad faith finding under the circumstances of this case must be found in the conduct of the litigation and not in bringing it.

2. 28 U.S.C. § 1927

Section 1927 of Title 28 provides for an award of attorneys' fees where an attorney "multiplies the proceedings in any case unreasonably and vexatiously. . . ." As explained in the legislative history of the 1980 amendment to section 1927, the section is designed as a sanction against dilatory litigation practices and is intended to require an attorney to satisfy personally the *excess* costs attributable to his misconduct. See H.R. Rep. No. 1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. Code Cong. & Ad. News 2781, 2782. See generally Annotation, *What Conduct Constitutes Multiplying Proceedings Unreasonably and Vexatiously so as to Warrant Imposition of Liability on Counsel Under 28 USCS § 1927 for Excess Costs, Expenses, and Attorney Fees*, 81 A.L.R. Fed. 36 (1987).

In *United States v. Ross*, 535 F.2d 346 (6th Cir. 1976), we initially defined "unreasonably and vexatiously" to mean "an intentional departure from proper conduct, or, at a minimum, . . . a reckless disregard of the duty owed by counsel to the court," *Id.* at 349. We stated in *Ross* that unintended, inadvertent, and negligent acts will not support an award under section 1927, *id.* at 349-50, even if significant costs are incurred by the court and opposing parties as a result thereof. As explained in *Colucci v.*

New York Times Co., 533 F. Supp. 1011, 1013-14 (S.D.N.Y. 1982), care must be taken in assessing attorneys' fees under section 1927 lest attorneys be deterred from their duty to "represent [a] client zealously. . . . *Model Code of Professional Responsibility* EC 7-1 (1980).

More recently, we have noted a relaxed standard applicable to section 1927 determinations. In *In Re: Jaques*, 761 F.2d 302 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1259 (1986), the majority opinion suggested that intent is no longer relevant to such determinations, *id.* at 306, although a majority of the panel could not agree on this rule. However, a similar concept was explicated in *Jones, supra*, as follows:

28 U.S.C. § 1927 authorizes a court to assess fees against an attorney for "unreasonable and vexatious" multiplication of litigation *despite the absence of any conscious impropriety*. An attorney's ethical obligation of zealous advocacy on behalf of his or her client does not amount to *carte blanche* to burden the federal courts by pursuing claims that are frivolous on the merits, or by pursuing nonfrivolous claims through the use of multiplicative litigation tactics that are harassing, dilatory, or otherwise "unreasonable and vexatious." Accordingly, at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney.

789 F.2d at 1230 (emphasis added). *Jones* makes clear that the standard for section 1927 determinations in this circuit is an *objective* one, entirely different from determinations under the bad faith rule. See *Haynie v. Ross Gear*

Div. of TRW, Inc., 799 F.2d 237, 243 (6th Cir. 1986), *cert. dismissed*, 107 S. Ct. 2475 (1987).

Nevertheless, we do not read these subsequent cases as overruling the thrust of *Ross*, to wit, that simple inadvertence or negligence that frustrates the trial judge will not support a sanction under section 1927. There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party. While this ideal may be difficult to implement, judges faced with motions under section 1927 should be mindful that their individual perturbations will not alone justify a sanction.

As we discuss below, section 1927 may support a sanction against Ruben for discrete acts of misconduct.

3. Federal Rule of Civil Procedure 11

Rule 11 was the basis of the unappealed sanction against Weiner and was again mentioned by the district judge in sanctioning Ruben. Rule 11, however, does not support the sanctions imposed in this case. Rule 11 is concerned with the signing of frivolous pleadings and other papers. *Oliveri, supra*, 803 F.2d at 1274. Because Ruben did not sign any of the pleadings or papers filed in the district court, Rule 11 simply cannot support the sanction against him. Although the language of Rule 11 also allows a sanction against a party, the district judge did not rely upon it in assessing the sanction against Rathbun.

4. 42 U.S.C. § 2000e-5(k)

In *Christiansburg, supra*, the Supreme Court described the test for awarding attorney's fees under 42 U.S.C. § 2000e-5(k) to a prevailing defendant in a Title VII case. The Supreme Court stated: "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421. As will be described, we conclude that this standard does not support an award of attorneys' fees against Rathbun.

B. Standard of Review

The standard for our review is whether the district judge abused his discretion in awarding attorneys' fees. *E.g. Jones, supra*, 789 F.2d at 1227, 1233; *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 185 (6th Cir.), *cert. denied*, 473 U.S. 906 (1985); *Tarter v. Raybuck*, 742 F.2d 977, 986 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985). We must review the record to determine whether it will support the district judge's factual findings. *See Jones*, 789 F.2d at 1230-31; *Smith*, 754 F.2d at 185; *Tarter*, 742 F.2d at 986.

Rathbun accepts the "abuse of discretion" standard. On the other hand, Ruben conclusorily argues for a *de novo* review of the district judge's conclusion, relying on *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). *Zaldivar* was a Rule 11 case, which, as we have noted, does not apply to Ruben. Further, the *Zaldivar* court itself noted in a subsequent case that the standard for review of sanctions premised on bad faith and frivol-

ousness is "abuse of discretion." *Mitchell v. Office of Los Angeles County Sup't of Schools*, 805 F.2d 844, 846 (9th Cir. 1986) (citing *Jones v. Giles*, 741 F.2d 245, 250 (9th Cir. 1984)).

IV. THE SANCTION AGAINST RATHBUN

A. Attorneys' Fees

The imposition of attorneys' fees against Rathbun must be reversed if only because she never had an adequate opportunity for a hearing on the record. *Roadway Express, supra*, 447 U.S. at 767. While briefs were filed on Rathbun's behalf, she was clearly abandoned by her attorneys at the hearing itself. This points out an inherent problem in a sanction hearing addressed to both a plaintiff and her attorneys, where the plaintiff and attorneys are not separately represented. See *Michigan Nat'l Bank v. Kroger Co.*, 619 F. Supp. 1149, 1162 (E.D. Mich. 1985). In this case, although Rathbun's attorneys advanced no arguments for her at the hearing, at least their positions were essentially similar, to wit, that the litigation was factually justified. The attorneys did not attempt to blame plaintiff; instead, Lester graciously tried to accept all responsibility for any problems with the case. Thus, while we express no opinion on the exact circumstances in which a party should be represented separately from her attorneys upon the consideration of sanctions, we nevertheless note that this a problem to which district judges should be alert.

1. Bad Faith

Even if Rathbun had been represented at the sanction hearing, she simply cannot be sanctioned under the circum-

stances here for bad faith either in the filing of the case or its prosecution.

a. Institution of the Action

Rathbun testified at trial about the use of derogatory language toward her based on her sex and national origin that she made known to her superiors and the school board. She described two attacks on her, one sexual. There was various testimony that Rathbun's superiors considered certain work that she was capable of doing "man's work." There was evidence that went toward the issue of retaliatory transfer, even if it was legally insufficient. While Rathbun's attorneys did not do a good job of presenting testimony from witnesses favorable to her, neither did the basis for her case rest entirely on her own testimony.

The school board defendants concede that the OCRC's finding of probable cause is some evidence justifying Rathbun's case, but they argue that the findings should be given little weight. See *Bowers v. Kraft Foods Corp.*, 606 F.2d 816, 818 (8th Cir. 1979). The district judge's sanction opinion did not even consider the fact that the OCRC had issued a probable cause finding against the school board that implicated some of the non-school board defendants.⁶

⁶As to the school board defendants, the initial complaint as well as the amended complaints clearly established (contrary to the district judge's statements) that they were joined only in their representative capacity. Thus, it is not clear why they thought it necessary to retain separate counsel. The papers in the appendix are ambiguous on this point. The record reflects that Rathbun moved to default the individual board members in January of 1983. This could not have been the motivat-

The probable cause finding of the OCRC, though not dispositive, lends support for Rathbun's belief that she had a legal claim of discrimination and did not pursue her action in bad faith. *See Mitchell, supra*, 805 F.2d at 847 (reversing an award of attorneys' fees to defendants on grounds of bad faith and frivolousness following Rule 41(b) dismissal of Title VII action where EEOC had issued probable cause determination); *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983) (upholding denial of an award of attorneys' fees to prevailing defendant in Title VII case where plaintiff put misplaced reliance on EEOC probable cause determination); *see also Bowers, supra* (reversing an award of attorneys' fees to defendants on grounds of frivolousness where EEOC had issued right-to-sue letter).

Rathbun was not completely unjustified in believing she was the subject of discrimination and a sexually harassing and abusive work environment. There is no evidence that Rathbun knew that the individual school board members (even assuming she did sue them in their individual capacity) could not be held liable for acts of discrimination, whether she informed them of the acts or not. *See Jones, supra* (abuse of discretion to award attorneys' fees under

(Continued from previous page)

ing factor behind their retaining separate counsel, however, since they had already retained separate counsel by September of 1982, when the record suggests they were at risk only in their representative capacity. A motion could have resolved this ambiguity and, perhaps, avoided the need for two attorneys to represent defendants throughout this lengthy litigation. While there may, at times, be reasons why defendants do not make dispositive motions, *see Kroger, supra*, 619 F. Supp. at 1154, we can conceive of no legitimate reason why this particular issue was not addressed forthrightly early in the case.

section 1988 or inherent power in race discrimination case in which employee failed to communicate alleged mistreatment to employer and joined individual defendants as "agents" of employer); *cf. Turner, supra*, 742 F.2d at 987.88 (abuse of discretion to award attorneys' fees under section 1988 where only parts of plaintiff's case without merit). Combining the OCRC finding with Rathbun's testimony and her attorneys' advice, it was clearly erroneous to find that Rathbun brought her discrimination claim in bad faith. *See Haynie, supra*, 799 F.2d at 242.

b. Conduct of the Litigation

As for possible bad faith by Rathbun in the *conduct* of the litigation, there is simply no evidence in the record suggesting that she acted in bad faith or contributed in any way to the manner in which this case was handled. If there was any fault in this regard, it lay with the attorneys and she should not be penalized for their misdeeds, if any. *Cf. Shea, supra* (sins of attorneys should not be visited upon plaintiff where attendant costs to defendants can be remedied by assessing defendants' attorneys' fees against Plaintiff's attorneys, especially where judge has not previously warned plaintiff of derelictions of her attorneys); *Carter v. City of Memphis, Tenn.*, 636 F.2d 159 (6th Cir. 1980) (*per curiam*) (expressing same concept).

2. Frivolousness Under *Christiansburg*

The individual school board members point out that, as to them, there was no probable cause finding. Less weight may be given to Rathbun's reliance on an administrative finding of probable cause since she included in her action

claims against defendants not considered by the OCRC. See *Badillo*, 717 F.2d at 1164.

The Supreme Court in *Christiansburg* illuminated the standard it announced with the following pertinent language:

In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-22.

As discussed above, here there is no evidence that Rathbun was aware that the individual school board members—again, assuming she sued them in their individual capacity, an assumption on which the district judge proceeded—could not be held legally responsible for conduct of her fellow employees. She had some foundation for believing that she had been discriminated against either on the basis of her sex or French origin. Combined with the advice of her original attorneys that she had a claim against the individual school board members and the subsequent encouragement by an attorney and law professor to pur-

sue these claims further, Rathbun certainly had a sufficient basis for continuing her claims against the individual defendants. *See Badillo, supra*, 717 F.2d at 1165; *see also Smith, supra*. 754 F.2d at 185 (abuse of discretion to impose sanction under section 1988 in race discrimination case where couple had some reason to believe they had been discriminated against in housing). The adding of some meritless claims does not make the whole case frivolous. *See Haynie, supra*, 799 F.2d at 242; *Tarter, supra*, 742 F.2d at 987-88; *Badillo*, 717 F.2d at 1164. Under the circumstances, a sanction against Rathbun under the *Christiansburg* standard was improper.

B. Costs

While the district judge had discretion not to tax costs against Rathbun, his doing so was not clearly an abuse of discretion since Rathbun's case lacked merit. *See Jones, supra*, 789 F.2d at 1233. However, under the circumstances, the issue of costs must be remanded for a determination of whether Rathbun is capable of paying the rather sizeable costs claimed by defendants (over \$3,000). *See Badilla, supra*, 717 F.2d at 1165. For example, in *Hill v. BASF Wyandotte Corp.*, 547 F.Supp. 348, 355-56 (E.D. Mich. 1982), the trial judge awarded \$3,000 in attorney fees in an employment discrimination case, but there was evidence in that case showing plaintiff's income to be \$24,610. *See also Piljan v. Michigan Dep't of Social Services*, 585 F.Supp. 1579, 1583 (E.D. Mich. 1984) (awarding \$3,000 in attorney fees as appropriate to deter frivolous Title VII claims). Ordinarily, while an assessment of costs will not be reversed on the basis of indigency, district judges are encouraged to consider the question of indigency

fully for the record. *Jones, id.* Although Rathbun raises the indigency issue for the first time on this appeal, because of the manner in which she was denied the opportunity to present her position at the hearing before the district judge, he should consider her indigency claim on remand. See *Haynie, supra*, 799 F.2d at 243 (remanding for indigency determination as to fees and costs).

V. THE SANCTION AGAINST RUBEN

Since Rathbun's case was instituted and prosecuted by several attorneys before Ruben entered an appearance, he cannot be sanctioned for "bad faith in bringing an action or causing an action to be brought." *Shimman, supra*.

The probable cause finding of the OCRC also precludes a finding that Ruben *entered* the action in bad faith. While the district judge ultimately discredited Rathbun's testimony, this alone is not a sufficient basis for sanctioning her attorneys on grounds of bad faith where no evidence clearly contradicted their client's statements at the time the attorney undertook representation. See *Oliveri, supra*, 803 F.2d at 1277-78. To the contrary, Rathbun's statements were corroborated by the OCRC's finding that other evidence supported a discrimination action. Ruben, like Rathbun, was justified in relying on this fact.

The real issue is whether Ruben *continued* to pursue the case in bad faith after some discrete moment in its history. See *Christiansburg*, 434 U.S. at 422. A determination of whether the sanction against Ruben was appropriate depends, then, on the paper trail in the district court and the extent of Ruben's involvement in the alleged misconduct of Rathbun's attorneys. See *Shimman, supra*.

A. Bad Faith in Continuing the Case Against the
Individual Defendants

Soon after the case was filed, all defendants except Haas, Hudock and Bernie Wilson⁷ moved to dismiss for lack of subject matter jurisdiction on the ground that the complaint indicated on its face that Rathbun filed her action one day after the statutory ninety-day period. Rathbun subsequently amended the complaint twice, establishing that she filed within ninety days of receipt of the right-to-sue letter. The school board members later moved for summary judgment on the ground that they were not "employers" under Title VII and that the district court lacked jurisdiction over them because Rathbun failed to name them in the EEOC charge. These motions were denied in January of 1983. Bernie Wilson was subsequently dismissed because of his death. Defendants Pegues, Berarducci, and Nicholas Angelo also moved for summary judgment on the ground that they were not named in the EEOC charge. Pegues and Berarducci were granted summary judgment on this ground in June of 1984, twenty days before trial. Nicholas Angelo was mentioned in the EEOC charge and, thus, was not granted summary judgment.

Ruben argues that denial of the above motions precluded the district judge from later imposing a sanction, since the denials gave him reason to believe that the case had merit. *See Jones, supra*, 789 F.2d at 1231 n.4 (suggesting sanction precluded where district court failed to grant individual employees' motion to dismiss on legal

⁷The record does not reflect any participation in the litigation by these three defendants until after Rathbun moved in January of 1983 for a default judgment against them. Their subsequent motions to file answers were granted.

grounds). The school board members, however, continue to argue on appeal that there was no legal justification for naming them as defendants. They argue that under Ohio law they were not Rathbun's "employers" so as to create liability under Title VII. They also reassert that they were not named in the EEOC charge.

The denial of the motions for summary judgment precludes a sanction on the ground that the claims against them were *legally* insufficient. Where a complaint contains "glaring legal deficiencies," the deficiencies and any ambiguities can be so easily resolved by motion that it is not unduly burdensome to defend. *See Jones, supra*, 789 F.2d at 1231-32. A sanction is generally improper where a successful motion could have avoided any additional legal expenses by defendants. *Oliveri, supra*, 803 F.2d at 1280; *Obin, supra*, 651 F.2d at 588 & n.15; *Browning, supra*, 560 F.2d at 1088. Such motions were filed and denied.⁸ To the extent defendants now argue Rathbun included legally groundless claims of mental anguish, emotional distress, and medical treatment, their failure to promptly file a motion to dismiss these prayers for relief

⁸This appeal does not address the correctness of the denial of defendants' motions, but only the imposition of the sanctions. (Three district judges presided over this case at various times. The bulk of the dispositive motions mentioned above were perfunctorily decided on two days in late January of 1983 by the second judge involved with the case, before the case was reassigned to the judge who presided over the trial and fee motions that are the subject of this appeal.) Thus, we must accept as correct the district court's refusal to dismiss most of the defendants on *legal* grounds. While Pegues and Berarducci were dismissed on legal grounds, the district judge's sanction opinion does not differentiate them from Rathbun's joining other individual defendants whose motions were denied.

precludes a determination that Ruben acted in bad faith in joining the prosecution of the complaint as a whole.

Since none of the above motions was predicated on the underlying facts, the denial of the motions did not preclude the district judge from imposing sanctions if the case was *factually* frivolous. The order imposing sanctions makes it clear, in fact, that it was not the *legal* insufficiency of the complaint that led to the sanctions but the lack of *factual* support for the case. We have, however, already rejected a factual predicate for sanctioning Ruben.

B. Bad Faith Misconduct in the Course of the Litigation

The only possible rationale for finding “bad faith” by Ruben lies in his conduct during the course of the litigation. The record shows that Ruben’s involvement was more significant than he admits. Ruben revised a brief in opposition to a motion, and he attended a pretrial conference, a discovery meeting, Rathbun’s deposition (the only one taken), and the opening day of trial. Although Ruben claims he served without compensation, in a telephone call to one of defendants’ lawyers it was represented that Rathbun had retained Ruben at a rate of \$150 an hour. Ruben wrote a letter to defendants’ attorneys asking he be served with copies of all pleadings, although it appears that, with one exception, none was sent him. This involvement was not insignificant, especially considering the apparently minimal preparation put forth by Lester. We find reasonable the district judge’s conclusion that, given the differing levels of experience between Lester and Ruben, Ruben played an influential role in the case.

In March of 1982, Lester sent to James Ries, the assistant city law director originally defending the case, a letter threatening a burdensome deposition schedule if defendants did not settle. The offer was refused, yet no one was deposed. (In fact, other than some interrogatories, Rathbun's attorneys conducted no discovery.) The district judge relied on this fact in levying the sanctions.⁹ Ruben relies on Lester's assertion at the sanction hearing that Ries encouraged him (Lester) to file a settlement offer that compared the expected costs of litigation if the case went to trial. Ruben also argues that he was not involved in the sending of the threatening letter and that, in any case, there is no showing it in any way multiplied the proceedings or prejudiced defendants.

A second event also figuring prominently in the district judge's imposition of sanctions was a motion filed by Weiner on Lester's behalf to disqualify defendants' attorneys on the mistaken grounds of conflict of interest.¹⁰ A discrete sanction had already been levied against Weiner for the filing of the motion. Ruben argues that the motion was filed in a good faith mistaken belief of the facts. Second, he argues that, although the motion itself was not withdrawn, the motion was promptly "rectified" by Rathbun's reply brief on the motion, which removed the name of one of defendant's attorneys. Third, Ruben argues that

⁹Combined with other "bad faith" tactics, a threat of numerous depositions may be the basis of a bad faith award against an attorney. See *Browning, supra*, 560 F.2d at 1089.

¹⁰A groundless motion to disqualify opposing counsel may support a sanction under 28 U.S.C. § 1927. See *Wold v. Minerals Eng'g Co.*, 575 F.Supp. 166 (D.Colo. 1983).

there was, in fact, a conflict. This last argument is contradicted by Weiner's concession at the sanction hearing that there was no factual foundation for the motion. Fourth, despite evidence that Ruben participated in the filing of the motion, he argues that his input was minimal and strictly academic.

Many, if not most, of the problems that arose in the case are attributable to inadequate pretrial conduct by Rathbun's attorneys. Discovery by Rathbun was almost nil. Lester and Ruben failed to file a trial brief and list of exhibits and witnesses before trial.¹¹ On the first day of trial, they were granted leave to file their papers the following day, which they did. The district judge recited these facts as evidence of bad faith and the cause of additional expense to defendants, although he did not state specifically what effect the delay had on defendants. Ruben argues that there was no prejudice to defendants in the one-day delay in filing the trial materials.¹² In seeking

¹¹Proceeding to trial upon inadequate evidence may lead to a sanction under 28 U.S.C. § 1927. See *Lewis v. Brown & Root, Inc.*, 722 F.2d 209 (5th Cir.), cert. denied, 467 U.S. 1231 (1984). However, while an attorney may be sanctioned for not acquiring facts necessary to rebut his good faith belief that the case warranted prosecution, inadequate pretrial preparation by itself (contrary to the district judge's suggestion) cannot justify a conclusion that Ruben pursued the case in bad faith. See *Fisher v. Fashion Institute of Technology*, 491 F.Supp. 879, 890 (S.D.N.Y. 1980).

¹²As an attorney of record, Ruben could be held accountable for failure to take discovery or comply with pretrial orders. See *Jones, supra*, 789 F.2d at 1232; *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178 (D.C. Cir.1980). However, we think that the district judge's willingness to accept the trial materials one day later, without imposing a sanction at the time, pre-

to uphold the sanctions, defendants also point out that Lester and Ruben were late the first day of trial and failed to have enough witnesses present on the third day of trial to occupy the day. Ruben also failed to appear at trial after the first day. The district judge recited this as further evidence of his unprofessionalism.¹³ Ruben argues in response that he did not appear after the first day because his role was ancillary and there was no need for him to be there.

As we have noted, the basis for the district judge's sanction against Ruben is not clearly delineated. The district judge apparently sanctioned Ruben under his inherent powers, rather than 28 U.S.C. § 1927, because he considered the cumulative nature of the facts to constitute gross unprofessional conduct for an attorney of record.

(Continued from previous page)

cluded him from later sanctioning Ruben for this delinquency. Cf. *Potlatch v. United States*, 679 F.2d 153 (9th Cir. 1982) (district court abused discretion in excluding documentary and witness evidence because of late filing, where party complied as well as possible, no intent not to comply with court's deadline, no prejudice to opposing party, and court expressed willingness to generally extend discovery deadlines and accept late filing if certain condition satisfied); *Vac-Air, Inc. v. John Mohr & Sons, Inc.*, 471 F.2d 231 (7th Cir. 1973) (while not condoning attorney's failures, including failure to timely answer interrogatories court reversed sanction of default where interrogatories were answered shortly after due and attorney had already paid fine for conduct that was partial basis for default).

¹³While failure to appear for trial may, in a proper case, result in a sanction under 28 U.S.C. § 1927, see *In Re: Jacques*, *supra*; see also *Coston v. Detroit Edison Co.*, 789 F.2d 377 (6th Cir. 1986), non-appearance for a court proceeding does not appear to be punishable where co-counsel is present in lieu of the subject attorney. See *United States v. Delahanty*, 488 F.2d 396, 399-400 (6th Cir. 1973).

Ruben argues that because he did not control the litigation, it was improper to sanction him.¹⁴ While Ruben's ancillary role could not entirely protect him, it would perhaps have been better for the district judge to advise him to either withdraw from the case or take over its management when it first became apparent that the case had severe problems.

That portion of the sanction attributable to Ruben's alleged misconduct must be reconsidered by the district judge with more exacting scrutiny. A district judge should not await the aggregation of what he considers multiple acts of misconduct and then levy an aggregated sanction without at least warning the attorneys at the time of each act or reserving decision upon timely requests by opposing counsel. Discrete acts of vexatious conduct should be identified and a determination made whether they were done in bad faith or, even if bad faith was not present, whether they multiplied the proceedings pursuant to 28 U.S.C. § 1927. Because the district judge did not analyze the impact upon defendants of discrete acts of claimed misconduct, remand is necessary to allow the district judge to make such a determination. As the Court of Appeals for the Second Circuit noted in *Browning, supra*:

[I]n an action not itself brought in bad faith, an award of attorneys' fees [against a plaintiff's attorney] should be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves. No attempt was made below to relate claimed expenses, costs, and fees to particular bad faith maneuvers. See *In re Boston & Provi-*

¹⁴See *Conley v. KFC Corp.*, 622 F.Supp. 767 (W.D.Ky. 1985).

dence *R.R. Corp.*, 501 F.2d 545, 550 (1st Cir. 1974). Accordingly, we remand for more specific findings as to those procedural motions or other actions, undertaken in bad faith, without justification or for an improper purpose, such as harassment or delay, and as to the expenses, costs, and attorneys' fees reasonably incurred by the opposing party or parties in meeting such improper motions, actions, or delays.

560 F.2d at 1089.

The extent to which Ruben's misfeasance, if any, caused defendants to incur additional expenses should be explored on remand.¹⁵ While we endorse the view that sanction proceedings should not be allowed to bloom into protracted satellite litigation, *see Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179 (D.C. Cir. 1985); Advisory Committee Notes to 1983 Amendment to Rule 11, 97 F.R.D. 198, 201 (1983), a district judge faced with a sanction motion must make certain findings in determining that an award is appropriate. Careful analysis and discrete findings are required, no matter how exasperating the case. The grounds for sanctions explored here are designed to improve the litigation process, but improvement cannot come at the expense of vigorous advocacy. District courts must strike a delicate balance between protecting the ad-

¹⁵Ruben argues that the district judge improperly sanctioned him the same amount as Lester—for every alleged act of misconduct from the inception of Rathbun's case—even though he (Ruben) did not join the litigation until much later. Ruben also argues that he never received an affidavit of hours from one of defendants' attorneys. We need not address these claims since, on remand, both defense attorneys will be required to file affidavits setting forth with specificity the time they incurred defending against claimed vexatious acts by Ruben only.

versary system and not allowing attorneys to exploit the system for their own purposes.

For the foregoing reasons, we REVERSE the sanctions as to Rathbun and REMAND for proceedings not inconsistent with this opinion as to Rathbun's liability for defendants' costs and Ruben's liability under the district judge's inherent power of 28 U.S.C. § 1927. On remand, we contemplate that the district judge will require defendants' attorneys to amend their motions to identify the claimed misconduct by Ruben and the extra efforts required by them as a result. The district judge can then proceed to consider their motions anew.

APPENDIX B

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JEANNE RATHBUN	)	CASE NO.
	)	C80-1914-Y
Plaintiff)	
	)	JUDGE
v	)	SAM H. BELL
)	
CITY OF WARREN BOARD	)	ORDER
OF EDUCATION, et al.)	
	)	(Filed October
Defendant	)	22, 1985)

On October 16, 1980, the plaintiff Jeanne Rathbun filed the above-entitled action against her employer, the Warren City School District Board of Education. Also named as defendants were several members of the board of education and various employees of the school system all of whom were named in their individual capacity. On June 26, 1984, a four day trial to the court commenced, and at the conclusion of the plaintiff's evidence, the court granted all of the defendants' motions for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Thereafter, on July 6, 1984, the court issued formal Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. An appeal of this judgment was timely filed by the plaintiff. On September 24, 1984, the Sixth Circuit Court of Appeals dismissed the appeal for want of prosecution under Rule 18(d) of the Rules of the Sixth Circuit.

Presently before the court are two motions for an award of attorney fees. The first was filed by Craig Lester, counsel for the individual board members, and the second by Charles Richards, counsel for the Warren Board of Education and the employees of the school system. All of the defendants are seeking an award of fees from the plaintiff, and from three of the attorneys who represented her throughout these proceedings, Elliot Lester, Alan Miles Ruben and Keith Weiner. Mr. Lester and Mr. Weiner are attorneys presently engaged in the private practice of law, while Mr. Ruben is a professor at the Cleveland Marshall College of Law at Cleveland State University. Mr. Ruben's participation in the action, however, was in his capacity as a private attorney and not as a representative of the College of Law or Cleveland State University. All three men are admitted to the bar of the United States District Court for the Northern District of Ohio and are currently in good standing in that court.

On March 15, 1985, the court conducted a hearing on the defendants' motions for an award of attorney fees. At that hearing Mr. Ruben was represented by counsel while Mr. Weiner and Mr. Lester appeared on their own behalf. Presumably, all three men were continuing to represent the plaintiff since they have not withdrawn from representing her nor have they requested leave to do so. Singularly, it should be noted that no argument or briefs were advanced on *Mrs. Rathbun's* behalf by any of the attorneys. Instead, each of them advanced positions on behalf of themselves. After considering the record and the arguments by counsel, the court hereby grants the motions for attorney fees and enters its findings as follows.

I

The first issue to be addressed involves the jurisdiction of this court to determine an award of attorney fees at this stage of the proceedings. The defendants contend that they are entitled to an award of fees against both the plaintiff and her counsel under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter Title VII). Specifically, they claim that fees should be awarded against plaintiff's counsel pursuant to the sanction provisions in Rule 11 of the Federal Rules of Civil Procedure, and through similar sanctions available under 18 U.S.C. § 1927. In addition, the defendants assert that jurisdiction for awarding fees against plaintiff's counsel is available by reason of the inherent power of a district court to sanction an attorney in a proper case.

Mr. Ruben and Mr. Weiner have argued that this court lacks subject matter jurisdiction over the attorney fee issue, inasmuch as the Sixth Circuit Court of Appeals had already dismissed the appeal for want of prosecution at the time the defendants filed their motions for attorney fees. It is counsel's position that once the court of appeals dismissed the appeal, this court lost all jurisdiction over the awarding of fees. In support of their jurisdiction contention, plaintiff's counsel rely upon the decision of the Seventh Circuit Court of Appeals in *Overnite Transp. Co. v. Chicago Indust. Tire Co.*, 697 F.2d 789 (7th Cir. 1983). The Seventh Circuit found that a district court did not have subject matter jurisdiction over a motion to award attorney fees under 28 U.S.C. § 1927, which was filed after the underlying action had been affirmed on appeal. In *Overnite*, the defendants' motion for attorney fees was

filed eight months after the original dismissal of the action by the trial court and nineteen days after the mandate was returned to the district court by the court of appeals which affirmed the judgment.

In holding that the filing of a motion for attorney fees after the underlying action was affirmed on appeal was unreasonable and outside of the district court's jurisdiction, the *Overnite* court found as follows:

Moreover, if there has been no appeal of the court's decision on the merits of a case, a fair reading of *Terket* reveals that absent a specific statute or other rule, a motion for attorney's fees and costs must be filed with the district court within a "reasonable time" or as "expeditiously as possible," after a judgment on the merits is entered. In the instant case no motion requesting attorney's fees was filed with either the district court or this court during the pendency of *Overnite's* original appeal of the merits. It was not until two months after this court affirmed the district court's dismissal of the plaintiff's action that the defendant filed its motion for fees and costs. Therefore, since the defendant failed to file a motion before any court requesting attorney's fees while the appeal on the merits was pending, and because the district court did not reserve jurisdiction nor was jurisdiction expressly reserved by statute, we hold the defendant did not file its motion within a reasonable time. . . . (Footnotes omitted.)

Overnite Transp. Co. v. Chicago Indust. Tire Co., *supra* at 793, citing *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980).

Although the Supreme Court has never specifically addressed the issue of when a motion for attorney fees should be filed in an action arising under Title VII, that Court has discussed the time limitations for filing a fee application in civil rights actions pursuant to 42 U.S.C.

§ 1988. In *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445 (1982), the prevailing party sought attorney fees four and one-half months after an appeal was dismissed and the parties had entered into a consent judgment. The Court, while reinstating the district court finding that the motion was timely filed, held that the time to file a motion for attorney fees is a reasonable time which is subject to the discretion of the district court, and that the trial court should deny a motion for fees which "unfairly surprises or prejudices the affected party." *Id.* at 454.

Applying the standards set forth above, this court now decides that all of the facts and circumstances surrounding the action must be considered to determine whether a motion for attorney fees has been timely filed and is thus within the jurisdiction of this court. To routinely find that all motions for attorney fees be filed prior to the termination of any appeal would contradict the finding in *White v. New Hampshire Dept. of Empl. Sec.*, *supra*. Instead, the court must examine the record to ascertain whether the motion for attorney fees was filed in a reasonable time and does not unfairly surprise or prejudice the plaintiff and plaintiff's counsel.

In this action, the certified copy of the order of the Sixth Circuit dismissing the appeal was received and docketed by the clerk of the district court on October 19, 1984, approximately two months after the filing of the appeal. On October 30, 1984, the individual school board members represented by Mr. Leister filed their motion for attorney fees. The motion for fees filed by Mr. Richards on behalf of the school board and its employees was filed

on January 9, 1985. Under the facts and circumstances of this action, this court finds that both motions were filed in a timely and reasonable manner and do not unfairly surprise or prejudice the plaintiff or her counsel.

Unlike the appeal in *Overnite* which was pending for several months prior to resolution, the appeal in this action was pending but for a brief period of time. Further, the dismissal of the appeal was directly caused by the actions or inactions of the plaintiff and her counsel. It was incumbent upon the plaintiff to either prosecute the appeal or be subject to a dismissal for failure to comply with the appellate rules. It is not unreasonable for defense counsel to presume that the plaintiff will prosecute her appeal once it was filed, and therefore the defendants must be allowed some time to move for attorney fees. Thus, the court is unable to find any prejudice to the plaintiff or her counsel by permitting the filing of the motions for fees.

In addition, the court is unable to find that plaintiff or her counsel should have been unfairly surprised by the filing of these motions. The motions were filed within one month and three and one-half months respectively of the date upon which the appeal was dismissed in the Sixth Circuit. In light of the four and one-half months after dismissal of the appeal time period determined in *White v. New Hampshire Dept. of Empl. Sec.*, *supra*, to have been reasonable, the defendants' actions in this case cannot be deemed to be unreasonable. Additionally, the plaintiff and her counsel at trial were made aware that fees could be sought by the defendants pursuant to the statements made by defense counsel during their motions under

Rule 41(b) of the Federal Rules of Civil Procedure. Further, they should have been aware, by reason of the defendants' repeated assertions throughout the trial proceedings, that defendant considered the action to be frivolous, unjustified in fact and law, and brought by the plaintiff and her counsel in bad faith. Hence, the court finds that the motions for awarding attorney fees were filed within a reasonable time frame and that it has jurisdiction to entertain the motions.

II

The first substantive issue to be addressed is that concerning the responsibility and liability of Mr. Weiner. The record reveals that at the time of his involvement in this action, Mr. Weiner had been a member of the bar of this state for a very short time. In his capacity as a duly licensed attorney, Weiner was employed as an associate in the firm of Lester & Associates and worked on this case on a limited basis under the supervision of Mr. Lester.

On January 5, 1983, plaintiff moved to disqualify all of the attorneys representing the various defendants. While this motion was admittedly prepared by Mr. Weiner while under the supervision and at the request of Mr. Lester, and only after consulting with Mr. Ruben on the legal issue raised therein, Mr. Weiner signed the motion. That pleading asserted that the various defense counsel had a conflict of interest because of their alleged multiple representation of defendants. Specifically, the plaintiff alleged as follows:

In the case at bar there exists an *overwhelming blatant appearance of conflicting interests* between both the Defendant Board and the Board Member De-

fendants and as such Defendant's counsel should not only be disqualified, but should have been alert to these conflicting interests and declined multiple representation of said Defendants. (Emphasis added.)

Plaintiff's Brief in Support of the Motion to Disqualify Counsel at page 3.

This statement is singularly inaccurate factually and plaintiff's counsel should have been aware of the inaccuracy at the time the motion was filed. The record and the pleadings submitted by the various defendants clearly delineate that the Warren Board of Education and its employees were being represented by Mr. Richards, while the individual board members were being represented by Mr. Leister. The alleged dual representation of defense counsel of both the Warren Board of Education and the individual board members had no factual basis whatsoever. The record reflects that these defendants were represented by separate counsel. Thus, factually, the alleged conflict in representation asserted by the plaintiff simply did not exist at the time the motion was filed. All counsel involved in this action should have been aware of the actual representation of each defendant by simply reviewing the pleadings in the record.

Rule 11 of the Federal Rules of Civil Procedure requires that every pleading, motion or other paper which is submitted to the court be signed by an attorney. In addition, the rule provides as follows:

The signature of an attorney . . . constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after *reasonable inquiry* it is *well grounded in fact* and is warranted

by existing law or a good faith argument for the extension, modification, or reversal of existing law, and *that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.* (Emphasis added.)

Further, the rule states that any attorney who violates the provisions of this rule *shall* be subject to an appropriate sanction, “which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.”

A motion for sanctions under Rule 11 should not be lightly made by a party or granted by a court. This court is very much aware of the serious effect the granting of a sanction may have upon a lawyer’s professional record and reputation in the community. In determining the appropriateness of imposing any sanctions under Rule 11 against Mr. Weiner in this action, the court has reviewed with care the Advisory Committee Notes to the rule which states in pertinent part:

The rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer’s conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he

depended on forwarding counsel or another member of the bar.

Applying this criteria to the conduct of counsel in this case, the court finds that sanctions should be imposed.

At the hearing on the motion for attorney fees and sanctions, the court addressed a direct inquiry to Mr. Weiner to determine the extent of his investigation into the underlying facts prior to his filing the motion in question. Mr. Weiner replied that he had done little investigation and, in fact, had never reviewed the pleadings in this action to ascertain which defendants were represented by Mr. Richards and which defendants were represented by Mr. Leister. Instead, Mr. Weiner stated that because the file in this matter was quite large and there were numerous defendants, the actual representation of the various defendants was confusing and unclear to him.

This careless approach to the filing of a serious and unjustified charge of professional misconduct and conflict of interest upon each member of defense counsel warrants the assessment of sanctions. The purpose of Rule 11 is to prevent and eventually end the filing of motions, pleadings, and other paper by counsel which are totally unfounded and not warranted by either the facts or the law. The motion which Mr. Weiner filed clearly comes under the rule. It further appears that the motion was filed with the sole purpose of disrupting the efforts of the defense attorneys to obtain discovery and bring this manner to trial. It is not the purpose of the rule to prevent or preclude the filing of motions predicated upon novel or unique legal theories or questions of fact. Instead, the purpose is to prevent a motion such as the one

filed by Mr. Weiner, a motion which was never researched in fact and was seemingly designed only to harass opposing counsel.

Mr. Weiner has asserted two separate theories for the proposition that sanctions are inappropriate against him. First he claims he was merely following the instructions of his supervisor Mr. Lester and advisor, Mr. Ruben, and second, he asserts that he was acting as an employee of Mr. Lester and would be protected by the doctrine of *respondeat superior*. Both of these arguments are totally without merit.

The fact that Mr. Lester and Mr. Ruben may have been involved in the preparation and filing of the motion to disqualify defense counsel does not alter Mr. Weiner's responsibility factually or legally. Mr. Weiner, was and is a licensed attorney. As such, he had and has a legal and professional responsibility under Rule 11 to abide by the rule's provisions which require that motions be filed after reasonable inquiry. When counsel pursues a motion "that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious." *In re TCI Ltd*, 769 F.2d 441, 445 (7th Cir. 1985). As an attorney, and as a professional who actively prepared the motion and *signed* the document, Mr. Weiner is fully accountable under Rule 11 for the filing of the motion. Although Mr. Lester asserts that he alone is responsible for the filing of unwarranted motions, his acceptance of responsibility does not alter the accountability of the attorney who actually certifies that the motion fulfills the standards required by Rule 11.

The assertion of the doctrine of *respondeat superior* as a defense to any sanctions under Rule 11 is without foundation in the law. The doctrine has no application to the actions taken by Mr. Weiner in this case. Rule 11 applies to the attorney who affixes his signature and thus certifies the document submitted to the court; it has no application to his employer. Though counsel may serve his business associates, his first and foremost duty is to the Law.

In determining the amount of the sanctions to be imposed under Rule 11 against Mr. Weiner, the court may consider all of the circumstances involved in this action including the experience and standing of counsel. See: *Huettig & Schromm v. Landscape Contractors Council*, 582 F.Supp. 1519, 1522 (N.D. Cal. 1984). Since Mr. Weiner's participation in this action was limited to the motion for disqualification and reply briefs to that motion, the court feels it just to assess only a sanction for the attorney fees which involved that motion. In considering a monetary sanction against Mr. Weiner, the court notes that he is a young attorney with a limited amount of experience, and that he relied to some extent upon the directions given by more experienced counsel, Mr. Lester and Mr. Ruben. Thus, it is the hope of this court that the sanction imposed against Mr. Weiner shall cause him in the future to consider the magnitude of his actions should he file a motion which is not well founded in fact or researched in the Law and also cause him to consider the professional responsibility he has to his client and to the other members of the bar and bench. Hence, this court orders that Mr. Weiner pay \$350.00 as attorney fees to Mr. Richards and \$150.00 as attorney fees to Mr. Leister on behalf of their respective clients as a sanction for violating Rule 11.

III

The next issue to be addressed by this court concerns whether the defendants are entitled to an award of attorney fees under Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k). The defendants contend that the plaintiff and her counsel pursued this action in bad faith even though they were aware that it was frivolous, unreasonable and without foundation in fact and law.

In *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), the Supreme Court discussed the awarding of attorney fees to a "prevailing party" under Title VII. The Supreme Court found that a prevailing plaintiff should normally be awarded attorney fees under the act, absent extraordinary circumstances. In reaching this conclusion, the Court examined the legislative history of Title VII, and noted that successful plaintiff is vindicating a policy established by the Congress in exposing unlawful employment discrimination. Thus, the Court concluded that Congress intended to provide remuneration for plaintiff's counsel to compensate them for their private role in enforcing the civil rights statutes by requiring the defendant-employer, which engages in discriminatory practices, to pay all of the costs including attorney fees of the action.

The *Christianburg Court* further stated that it was the legislative intent to provide additional protection to a defendant from unwarranted actions brought against him. This protection for defendants was the subject of the discussion which follows:

The sparse legislative history of § 706(k) reveals a little more than the barest outlines of a proper accommodation of the competing considerations we have

discussed. The only specific references to § 706(k) in the legislative debates indicates that the fee provision was included to "make it easier for a plaintiff of limited means to bring a meritorious suit." During the Senate floor discussions of the almost identical attorney's fees provision of Title II, however, several Senators explained that its allowance of awards to defendants would serve "to deter the bringing of lawsuits without foundation," "to discourage frivolous suits," and "to diminish the likelihood of unjustified suits being brought." If anything can be gleaned from these fragments of legislative history, it is that *while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis.* (Emphasis added, footnotes omitted.)

Id. at 420.

Having found that Congress intended to provide some protections to prevailing defendants, the *Christiansburg* Court developed a standard which must be met in order to award attorney fees to a prevailing defendant. The Court stated,

In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case *upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.*

In applying this criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective

plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit. (Emphasis added.)

Id. at 421-422. Therefore, this court must determine whether the plaintiff's claim was "frivolous, unreasonable, or without foundation" at the outset of this litigation or "that the plaintiff continued to litigate after it clearly became so." *Id.* Further, should this court find that the instant action was either brought or continued in bad faith by the plaintiff or her counsel, "there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." *Id.*

The Sixth Circuit Court of Appeals has recently discussed the *Christiansburg* standard for awarding attorney fees to a prevailing defendant in civil rights actions. In *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984), the court reversed the district court's award of attorney's fees to a defendant since the underlying claim was not wholly meritless or without foundation. In *Tartar*, the issue before the district court involved a student's fourth amendment rights in the context of a physical search of the student by a school official. Although the district court found that the student had consented to the search, the consent issue "was reasonably in dispute given the context of the purported waiver of important constitutional rights. The exact nature and extent of a student's fourth amendment

rights are not well settled.” *Id.* at 988. Thus, the circuit court held that a fee award would not be justified when a factual dispute exists and the plaintiff is asserting a cause of action predicated upon the violation of constitutional rights which are not well defined under the law.

The *Christiansburg* standards have also been applied recently by the Sixth Circuit to a fair housing action. In *Smith v. Smythe-Cramer Co.*, 754 F.2d 180 (6th Cir. 1985), the court stated:

Application of these standards requires inquiry into the plaintiffs’ basis for bringing suit. Awards to prevailing defendants will depend on the factual circumstances of each case. While a showing of bad faith is not required for an award of attorneys fees to a prevailing defendant, such a showing would justify an award of fees. Additionally, courts have awarded attorneys fees to prevailing defendants where no evidence supports the plaintiff’s position or the defects in the suit are of such magnitude that the plaintiff’s ultimate failure is clearly apparent from the beginning or at some significant point in the proceedings after which the plaintiff continues to litigate. As the Supreme Court emphasized in *Hughes*, however, the mere fact that allegations prove legally insufficient to require a trial does not, for that reason alone, render a complaint groundless under *Christiansburg*, 449 U.S. at 16, 101 S.Ct. at 179.

Id. at 183. The court further noted that awards of attorney fees have been properly granted to defendants when a plaintiff misuses the civil rights laws to collaterally challenge state judgments, *Tonti v. Petropoulos*, 656 F.2d 212, 215-16 (6th Cir. 1981), or when a plaintiff brings a claim which is clearly barred by unambiguous case law. *Werch v. City of Berlin*, 673 F.2d 192, 196 (7th Cir. 1982).

Unlike the novel legal issues presented to the trial court in *Tartar v. Raybuck*, *supra*, the legal issues advanced by the plaintiff in this action involve a settled area of the law. The plaintiff did not advance or even attempt to advance facts or theories which would serve to effectuate a change in existing law under Title VII; instead, she asserted that a cause of action of discrimination based upon sex and national origin factually existed under the standards for Title VII actions set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Therefore, any determination of whether the plaintiff's filing and prosecution of this action meets the standards for frivolous claims under *Christiansburg*, involves a review of factual circumstances surrounding the filing and prosecution of this case only in this manner may it be determined whether a good faith belief of a factual dispute existed.

Conjunctive to with this determination is a review of the involvement of plaintiff's counsel, Mr. Lester and Mr. Ruben. The defendants assert that both attorneys prosecuted this action in bad faith solely to extort a settlement from the school board. Further, it is asserted that plaintiff's counsel knew that the underlying claims and allegations made by the plaintiff were frivolous and totally without merit, but in spite of that knowledge continued to press this litigation in the hope that due to the threat of the expense of the litigation, some settlement could be forced upon the defendants.

In addition to the authority contained in Rule 11, a district court may assess attorney fees against an attorney who comes before it pursuant to 28 U.S.C. § 1927, which follows:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

This statute has been construed by the Supreme Court to permit the awarding of attorney fees against counsel in a civil rights action as sanction under limited circumstances.

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the Supreme Court found that attorney fees could be assessed and awarded against a plaintiff's counsel under 28 U.S.C. § 1927 if counsel willfully abuses the judicial process. The Court stated:

Of course, the general rule in federal courts is that a litigant cannot recover his counsel fees. See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. at 257. But that rule does not apply when the opposing party has acted in bad faith. In *Alyeska*, we acknowledged the "inherent power" of courts to "assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant [,] *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-428 (1923), '*Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*, at 718; or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .' *F.D. Rich Co. [v. United States ex rel. Industrial Lumber Co.]*, 417 U.S. [116], at 129 [(1974)] (citing *Vaughan v. Atkinson*, 369 U.S. 527 (1962)). *Id.*, at 258-259.

The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. "[B]ad faith" may be found, not only

in the actions that led to the lawsuit, but also in the conduct of the litigation.” *Hall v. Cole*, 412 U.S. 1, 15 (1973). See *Browning Debenture Holders’ Comm. v. DASA Corp.*, 560 F.2d 1078, 1088 (CA2 1977). This view coincides with the ruling in *Link, supra*, which approved judicial power to dismiss a case not because the substantive claim was without merit, but because the plaintiff failed to pursue the litigation.

The power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. (Footnote omitted.)

Id. at 765-766. Under this test, the trial court may only award attorney fees if it makes a specific finding that plaintiff’s counsel’s conduct constituted or was tantamount to bad faith. See *In re TCI Ltd, supra*, at 445; *Dreiling v. Peugeot Motors of America, Inc.*, 768 F.2d 1159, 1165 (10th Cir. 1985); *United States v. Austin*, 749 F.2d 1407, 1408 (9th Cir. 1984); *Shimman v. International Union of Operating Engineers*, 744 F.2d 1226, 1230 (6th Cir. 1984). In this regard, the court must review the actions and conduct of both Mr. Lester and Mr. Ruben separately.

Mr. Lester first entered an appearance in this action on October 5, 1981 after original counsel obtained leave to withdraw. Mr. Ruben filed his notice of appearance as “additional counsel” on January 25, 1982. Thereafter, all court notices or orders were sent to both men by the clerk of courts. At all pretrials conducted in this matter before this court, one or both men attended on behalf of the plaintiff.

On March 15, 1982, Mr. Lester sent a letter to the defendants wherein he offered to settle this action for fifty-four thousand dollars. In this letter, counsel advised the defendants that their failure to accept this offer "will dramatically increase Mrs. Rathbun's legal fees and render settlement for fifty-four thousand "unrealistic." Specifically, counsel stated "[t]his office estimates that taking into consideration a fifteen day trial, seventeen or more depositions and various other costs, the total additional legal costs would be estimated at well over One-hundred Thousand Dollars." Contemporaneously, counsel informed the defendants that unless the settlement offer was accepted immediately, deposition subpoenas would be sent to 22 employees and officials of the Warren City School System. Many of these people were not parties to this action. These depositions were to take place in Cleveland, Ohio and would last an estimated "eight hours per day per person."

Upon receipt of this letter, the defendants did not agree to settle this litigation. In spite of defendant's position, the 22 employees and officials of the school system were never issued the subpoenas nor were any of them deposed as stated in the Letter of March 15. In fact, the only deposition ever conducted in this action was the deposition of the plaintiff which was taken by the defendants. The plaintiff did not undertake any depositions but instead elected to conduct discovery through the issuance of several sets of interrogatories to the various defendants.

On March 29, 1984, a trial notice was issued, setting this action for trial on June 26, 1984. Simultaneously,

this court issued an order regarding the preparation of counsel for trial, which order required counsel for all parties to submit to the court proposed witness Lists, and pre-marked exhibits two days prior to the trial. In addition, counsel was required to submit proposed findings of fact and conclusions of law and trial briefs. Although this order was sent to all counsel of record, only defense counsel complied with the court's order regarding pre-trial submissions. Neither attorney for the plaintiff complied with the court's order or requested leave to comply prior to trial.

On the morning of trial, Mrs. Rathbun was represented by Mr. Lester and Mr. Ruben in the courtroom. The trial, however, was delayed because Mr. Lester was late in arriving to commence trial. Upon Mr. Lester's arrival, the proceedings were yet further delayed in order to ascertain the reasons for Mr. Lester and Professor Ruben's total failure to comply in any manner with the court's pretrial order of March 29, 1984. Thereafter, Mr. Lester requested and was granted leave to file all pre-trial submissions by 9:00 A.M. on the next day. The trial of this matter then commenced with both Mr. Lester and Mr. Ruben in attendance. The sole witness called on the first day of trial was the plaintiff herself.

On June 27, 1984, Mr. Lester filed his pretrial submissions which included a witness list with twenty-one people named. Among the purported witnesses was a man who had recently undergone a serious heart operation and was under the advise of his physician to remain bed-ridden. Also named as a witness was a man who had died approximately eleven months prior to trial. State-

ment of the fact of his death was made part of the record in this action on September 12, 1983.

Mr. Ruben did not attend the trial proceedings after the first day. Prior to his absence the court was not informed that he would no longer participate in the trial proceedings, nor was his absence ever explained.

On the third day of trial, the plaintiff did not have sufficient witnesses to complete the day, even though counsel had been previously made aware of the court's daily schedule for trial and had been requested to schedule his witnesses accordingly. Until this time, Mr. Lester had called as witnesses Mrs. Rathbun, her husband, a friend of the plaintiff's and the defendant's representative at trial, Mr. Angelo. At this point Mr. Lester disclosed that none of the witnesses named on his list had yet been the subject of subpoena or even notified that they could possibly be called as witnesses. Counsel assured the court that he would personally have the subpoenas served that evening and that no further delays in the trial would occur. Mr. Lester explained that he and the plaintiff had limited financial resources and that he was, at this point in the proceedings, prosecuting the action on his own.

The next day, Mr. Lester called six witnesses who were the plaintiff's co-workers and who had been issued subpoenas the previous evening. Several of these witnesses testified that they knew nothing concerning the subject matter of this litigation, and all testified that they had very limited contact with the plaintiff. None of these witnesses had been deposed or even interviewed by plaintiff's counsel prior to testifying at trial. In fact, much

of the evidence presented through these witnesses and through earlier witnesses offered by the plaintiff contrasted sharply with the testimony offered by the plaintiff herself.

In essence, both of plaintiff's attorneys' preparation and performance at trial were less than professional, to say the least. Although the plaintiff brought this action against five individual school board members and several individual employees of the school systems, the record is totally devoid of any evidence involving these people. In fact most of the individual defendants' names, identities, employment or official positions were never mentioned by any witness including the plaintiff, nor do these defendants' names appear in any exhibit offered by the plaintiff. Instead, the record establishes only that these individual defendants had the misfortune of being so named and were therefore forced to defend this lawsuit. It is clear to the court that under the facts and circumstances found in the record, the filing and prosecution of this action against all of the individual defendants was a frivolous and unwarranted act as defined in *Christiansburg*. Further, this court can only reach one conclusion regarding the purpose of this filing and prosecution by the plaintiff and her counsel as it relates to the individual defendants. That conclusion is that the plaintiff, from the inception of this action and her counsel from the time they entered appearances in this case, acted with the intent to extract some monetary settlement from several individuals associated with the school system because of the threat of defending and expense of litigating this action, even though the plaintiff had no evidence either direct or circumstantial of any wrongdoing or liability

on the part of these individual defendants. The actions on the part of Mrs. Rathbun, Mr. Lester and Mr. Ruben of bringing and prosecuting unfounded charges of intentional discrimination against the innocent individual defendants are totally contradictory to the legislative purpose of Title VII and the other civil rights laws of this country. Under such circumstances, as heretofore described, the court finds that the plaintiff, Mr. Lester and Mr. Ruben have all acted without requisite good faith by charging and prosecuting the individual defendants when they neither had nor produced a single thread of evidence against these defendants. Further, the testimony of the plaintiff herself clearly demonstrated that she had no evidence whatsoever which would indicate any discriminatory or unlawful action on the part of those individuals.

The court also finds that the action against the Warren Board of Education was brought by the plaintiff and prosecuted by Mr. Lester and Mr. Ruben in bad faith. In her pleadings, the plaintiff alleged that the actions of her employer against her were a result of unlawful discrimination in violation of Title VII. At trial, Mrs. Rathbun testified that she was denied overtime opportunities by the board of education and that she received burdensome work tasks and a retaliative transfer to another school. However, all of the relevant evidence offered by Mrs. Rathbun, including some of her testimony and that of the other witnesses which she offered, disputed and contradicted each and every claim.

The record reveals factually that Mrs. Rathbun did receive numerous overtime opportunities with the school

board. This was true even though she was at that time only a substitute employee of the school system, and was not entitled under school policy to work overtime unless all of the regular employees were first offered the overtime work. Further, the record reveals that Ms. Rathbun was actually aware that she was working as much or more overtime as her male co-workers, but wanted to work even more hours. The total lack of evidence of unconstitutional or discriminatory acts presented at trial by the plaintiff is grounds for awarding attorney fees against Mrs. Rathbun. *See Lewis v. Brown & Root, Inc.*, 711 F.2d 1287 (5th Cir. 1983) *cert denied* —U.S. —, 104 S. Ct. 2690, 81 L.Ed.2d 884 (1984).

Additionally, the record reveals that Mrs. Rathbun was transferred to an elementary school close to her home after an incident occurred between her and a male co-worker while she was employed at the high school. This incident involved a physical attack upon the plaintiff by the co-worker. Subsequent to this attack, the school board met to administer a severe discipline against the man. However, at the request of Mrs. Rathbun, no discipline was administered against the co-worker. There was no evidence offered by the plaintiff that her transfer after this incident was for a discriminatory reason. The sole evidence offered by the plaintiff demonstrated that the transfer was to alleviate the plaintiff's concerns about working with the men at the high school and to provide her employment closer to her home. Thus, the action against the Warren Board of Education was totally unsupported by any evidence of discriminatory conduct and must be considered to be frivolous, without foundation in fact, and lacking in good faith.

The actions of Mr. Lester and Mr. Ruben, as they concern the Warren Board of Education, must also be considered to be suspect. Both men knew or should have known that the prosecution of this action was warrantless. Therefore, counsel's actions can only be considered to have been conducted with an eye to compelling defendants to enter into a settlement so as to avoid the expense of litigation. The attorneys not only continued to prosecute this action, with knowledge of its merits, but engaged in a course of conduct which harassed the defendants and their counsel. First, Mr. Lester sent the "proposed settlement" letter of March 15, 1982 which offers the defendants the alternative of settling the action for fifty-four thousand dollars or face twenty-two imminent depositions, a fifteen day trial and one hundred thousand dollars in legal fees. When this proposal was rejected and the defendants commenced their own discovery requests, Mr. Lester instructed Mr. Weiner to file, under the guidance of Mr. Ruben, the previously mentioned motion to disqualify counsel. Finally, the approach taken by Mr. Lester and Mr. Ruben to the preparation for and conduct of the trial raises grave questions concerning their regard for their professional responsibility to fellow members of the bar and to the litigants who come before this court.

The activities of counsel previously described, together with the posture taken by plaintiff herself, present an unparalleled example of an abusive use of the system of justice in the civil rights area. Such an abuse of Title VII and conduct of counsel can not be tolerated by this court. Hence, this court shall award appropriate fees against each of the parties involved.

When making a determination of the attorney fee award, the court must consider the reasonableness of the hours expended and the reasonableness of the rate charged. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Sixth Circuit has expressly set forth the guidelines for awarding attorney fees under 42 U.S.C. § 1988. In *Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), the court held that:

[t]he district court should indicate on the record the number of hours it finds the plaintiffs' attorneys have expended on the case. This finding must first take into account the affidavits of counsel. The hours claimed need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reason for its action, so that we may determine whether the court properly exercised its discretion or made an error of law in its conclusion. Hours may be cut for duplication, padding or frivolous claims.

Id. at 636. Although the *Northcross* decision involves a prevailing plaintiff under section 1983, this court must consider this guidance given by the circuit when awarding fees in this action. See also *Murphy v. International Union of Operating Engineers, Local 18*, — F.2d — (6th Cir. September 30, 1985).

IV

Both attorneys for the defendants have submitted the number of hours each expended in the defense of this action. Mr. Leister, the attorney for the individual school board members submitted his affidavit with supporting documentation that reveals that his clients were billed

\$12,744.00 for attorney fees and \$716.17 for costs actually incurred by counsel. In addition, Mr. Richards, the attorney for the Warren Board of Education and its employees, submitted his affidavit with supporting documentation that reveals that his clients were billed \$30,797.50 for the defense of this action and \$2,390.54 for costs incurred by counsel. It is not disputed that Mr. Richards undertook the lead role for the defense and thus devoted more billable hours to this case. Having reviewed the documents and the hours expended by counsel, the court finds that they are reasonable under the facts of this litigation and the length of the trial.

When determining a reasonable hourly rate, a court must examine "the fair market value of the services provided." *Northcross v. Board of Ed. of Memphis City Schools, supra* at 638. The fair market value would be the hourly rate charged by attorneys with similar "training, background, experience and skill" as the plaintiff's counsel. *Id.* In this action, the hourly rates charged by both Mr. Leister and Mr. Richards must be found to be reasonable after considering their respective backgrounds and their performance before this court. Mr. Leister charged between \$65.00 and \$55.00 per hour for all work performed while Mr. Richards charged \$70.00 per hours. These rates are well within the rates charged by attorneys in the Northern District of Ohio and are thus found to be reasonable.

V

The final issue before this court involves the amount of the award to be assessed against Mr. Lester, Mr. Ruben and the plaintiff. In making the award against Mr. Lester, the court must consider his involvement in this action.

Much of the expense incurred by the defendants was a direct result of Mr. Lester's tactics prior to trial, his failure to comply with the court's pre-trial order, and his failure to provide a timely examination of witnesses at trial. Hence the court in its discretion awards Mr. Leister \$2,500.00 and Mr. Richards \$2,500.00 on behalf of their client against Mr. Lester as a sanction for prosecuting this action in bad faith.

The awarding of fees against Mr. Ruben requires more explanation. Mr. Ruben asserts that he was acting only as the advisor or teacher to Mr. Lester, and when applicable, Mr. Weiner. Further, he contends, that he was not an active participant in these proceedings but was merely assisting a friend and former student. Thus, Mr. Ruben attempts to avoid any responsibility for this action by placing blame and responsibility upon Mr. Lester. However, the record in this action will not permit Mr. Ruben to escape responsibility so conveniently by accusing his co-counsel.

That record reveals that Mr. Ruben was in fact an active participant in these proceedings from the date he entered an appearance in this case through the trial. He attended pretrials conducted by this court as a representative of the plaintiff. In addition, he appeared at trial as plaintiff's counsel and in that capacity is fully responsible for the failure of the plaintiff to comply with the court's pretrial order or obtain witnesses for trial.

In essence Mr. Ruben appears to have wanted to have participated in any possible success in this case or settlement that may have been extracted from the defendants. However, he also appears now to avoid any responsibility

by claiming total ignorance of the facts of the case and the manner in which it was prosecuted. It should be noted that Mr. Ruben is not a newcomer to this bar, but instead has practiced for many years and enjoys the reputation associated with his employment at a fine institution. As an experienced member of the bar, he must surely be charged with the knowledge and the responsibility that counsel of record undertakes when he accepts the position of representing a party in a lawsuit in the federal courts. To state that he was unaware of the frivolous nature of the plaintiff's underlying claims and the harassment of opposing counsel is simply not credible. Hence, this court also awards Mr. Leister \$2,500.00 and Mr. Richards \$2,500.00 on behalf of their respective clients against Mr. Ruben as a sanction for his participation in the course of conduct pursued by plaintiff.

The balance of the fees incurred by the defense counsel should be recovered from the plaintiff herself pursuant to Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k). The ultimate responsibility for the filing and prosecution of this case must be placed upon her because she knew from the inception of this action that it was frivolous and without any foundation in fact.

The record reveals that the plaintiff voluntarily went on a medical leave from her employment with the Warren Board of Education in order to return to her native France. During the years that followed this leave, the school system made numerous requests or offers of different comparable positions in the hope that she would return to work. At no time, however, did the plaintiff ever accept a position or return to work from her medical leave. At the plaintiffs' election, she chose to remain in

App. 61

France and not return to work. Nowhere in the record does it show that she was treated in a discriminatory manner. This fact is relevant since at trial the damage sought by the plaintiff was her lost wages and her 'right' to reinstatement at her previous position. However, all of this relief was always available to her by merely working. Instead, she chose not to work.

The plaintiff was treated compassionately and fairly and was never discriminated against by her employer. In fact, many of the people who helped her gain the position originally and who later accommodated her desire to work overtime even though she was not eligible for the work as a temporary employee were "rewarded" for their assistance by being named as defendants in this action. Under these conditions, the court has no hesitation in holding that she acted in bad faith in filing this action, and is therefore fully accountable for the balance of the fees incurred by the defendants.

In summary, the court finds that the fees and costs incurred by Mr. Leister's and Mr. Richard's clients shall be the responsibility of the plaintiff and her counsel. Mr. Leister's fees and costs are awarded as follows:

Mr. Weiner	\$ 150.00
Mr. Lester	2,500.00
Mr. Ruben	2,500.00
Mrs. Rathbun	8,321.17
	<hr/>
	\$ 13,471.00

Mr. Richard's fees and costs are awarded as follows:

Mr. Weiner	\$ 350.00
Mr. Lester	2,500.00
Mr. Ruben	2,500.00
Mrs. Rathbun	27,838.04
	<hr/>
	\$ 33,188.04

It is regrettable when circumstances conspire to necessitate an opinion such as this. The court's ruling impacts financially upon the plaintiff; it also impacts both financially and ethically upon counsel. But this court, as others, serves the whole of our society, not one claimant or one profession.

Adherence to the principles of law set forth above and commitment to principles of fundamental fairness require such a ruling if only for the purpose of protecting innocent future defendants from the same type of unwarranted prosecution.

Accordingly, the defendants' motion for awarding attorney fees is hereby granted as set forth in this opinion.

IT IS SO ORDERED.

/s/ Sam H. Bell
SAM H. BELL
U. S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEANNE RATHBUN)	
	)	CASE NO. C80-
— Plaintiff	)	1914-Y
)	
-v-	)	JUDGE SAM
	)	H. BELL
WARREN BOARD OF	)	FINDINGS OF
EDUCATION, et al.	)	FACT AND
	)	CONCLUSIONS
Defendant	)	OF LAW

STATEMENT OF THE CASE

(Filed July 6, 1984)

This action was filed on October 16, 1980 by plaintiff, Jeanne Rathburn against the Warren City School District Board of Education and several of its employees and board members. Jurisdiction of this court was invoked pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*

In brief, Mrs. Rathbun charged that while she was working for the Warren school system as a janitor she was denied the same opportunities as her male co-workers because of her sex and national origin. Mrs. Rathbun is a naturalized citizen of French ancestry.

On the basis of these contentions, a trial of this cause was begun on June 26, 1984, continuing for four days thereafter. At the conclusion of the plaintiff's case, the court as trier of the facts rendered judgment against the plain-

tiff and in favor of all of the defendants in accordance with Rule 41(b) of the Federal Rules of Civil Procedure.

The evidence adduced by plaintiff consisted of her own testimony, the testimony obtained as if on cross examination of certain named defendants, and witnesses who had been associated with Mrs. Rathbun during her years of employment for the Warren City School District. This fact is mentioned because the testimony given by members of the "fellow employee" group contrasted sharply with that offered by plaintiff herself. Inasmuch as such testimony was offered by plaintiff, a relatively unusual problem was faced by the court in its determination relative to whether plaintiff had established a prima facie case at the conclusion of her case in chief.

Mrs. Rathbun gave evidence of a litany of associated ills suffered by her at the hands of various defendants during her years of active employment. In sum, her allegations of disparate treatment centered on four delineated areas.

1. Denied the ability to earn overtime monies.
2. A suffering of verbal and physical abuse and intimidation from certain of her coworkers.
3. Retaliative transfers within the school system.
4. The assignment to her of burdensome work tasks.

Concerning these allegations, the court has considered the evidence, both testimonial and otherwise evidential and pursuant to Rule 52 of the Federal Rules of Civil Procedure enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Mrs. Rathbun started working for the Warren City School District in 1973 as a substitute janitor; however, she worked on a regular basis at East Jr. High School. In 1974, the plaintiff was transferred to Warren G. Harding High School (hereinafter Harding) where she was assigned to work on the second floor. While at Harding, Mrs. Rathbun passed a civil service examination and on October 6, 1975 became a regular full-time employee of the school system and was thereafter protected by Ohio Civil Service Laws as a non-certified classified employee. During this period Mrs. Rathbun was the only woman janitor employed at Harding. However, women were employed as janitors in the other buildings in the school system.

At Harding, janitors were assigned overtime by the custodian in charge of the building, William Haas. Mr. Haas would assign the overtime work to the janitor whose work station was located where the overtime work was to be performed. If that individual declined to work on the overtime, the work was offered to the other janitors. An attempt was made by Haas to distribute equally the overtime work between all of the janitors who expressed an interest in the work including Mrs. Rathbun. The overtime was not offered to a substitute janitor unless all of the regular full-time employees had refused to work.

The major source of overtime work involved the care and clean-up of the high school football stadium. During the football season, the athletic department used a tarpaulin to cover the field. This tarpaulin was placed over the playing surface whenever it was raining, and removed

after the rain stopped or when it was time to start playing the football game. This operation required the physical labors of ten or twelve people, and provided overtime to the janitorial staff at Harding and to other employees of the school system.

The removal and placement of the tarpaulin when it was wet was strenuous work, and Haas generally assigned only the male janitors to work this overtime. Several of the janitors refused this overtime because of their age or physical condition. Mrs. Rathbun informed Haas that she would like to participate in the overtime involving the football stadium. Thereafter, the plaintiff was regularly assigned to work on the clean-up crew at the stadium and received overtime. Some of this overtime was received while Mrs. Rathbun was still a regular substitute employee of the school system. However, the plaintiff was not regularly used to help with the tarpaulin, but instead was assigned the tasks of cleaning the restrooms and locker rooms. Mrs. Rathbun only worked on the tarpaulin on a few occasions, and found that she was capable of doing the work. By 1977, the athletic department stopped using the tarpaulin and started to use students to clean the stadium. These moves effectively ended the overtime work for all of the janitors at the football stadium.

In those exhibits introduced into evidence, there exist no compilations concerning how much overtime was worked by plaintiff either as a substitute or full time employee. It seems evident that though some of those who felt that certain overtime jobs then existent were "men's work", such as the erection of bleachers and the removal of field tarpaulins, such jobs were performed by Mrs. Rathbun at

her urging. It is further evident that she was given lighter duty work to do at overtime rates.

At one point during the plaintiff's history at Harding, she requested and was permitted to temporarily change her job assignment to the adjacent fieldhouse. This vacancy was created when a male janitor took an extended sick leave. While working in the fieldhouse, Mrs. Rathbun was given the overtime associated with this particular job assignment. The fieldhouse generated overtime for the janitors whenever a basketball game or wrestling match was held. This overtime was later eliminated because of an austerity program in the school system.

The plaintiff and some of her male co-workers were not compatible and were unable to work together in harmony. The plaintiff and these co-workers repeatedly ~~complained to various of~~ their supervisors about the conduct of the others. This disharmony eventually culminated in an incident between the plaintiff and a totally deaf and dumb co-worker who physically attacked Mrs. Rathbun. The day after this incident the school board met to administer a severe discipline against the co-worker, however, at the request of the plaintiff, the board did not discipline the man.

On May 30, 1978, the plaintiff was transferred to Devon Elementary School. This transfer was made because the business manager of the school, Nicholas Angelo, felt that the personnel problems at Harding could be resolved if Mrs. Rathbun were moved to another school. The business manager chose Devon Elementary because it was close to the plaintiff's home and was a school that only required one janitor.

While at Devon Elementary, the plaintiff received several obscene phone calls and was scared by people wearing masks. The identity of these people was never ascertained by the plaintiff even though the F.B.I. conducted an investigation into the problem. The plaintiff remained at Devon until she went on a medical leave in 1981.

During Mrs. Rathbun's employment, she had a history of absenteeism, and took several extended leaves. The plaintiff used these leaves to return to France where she would rest. The plaintiff felt these trips were necessary to improve her mental health by getting away from the job environment.

CONCLUSIONS OF LAW

Mrs. Rathbun seeks relief in this matter pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* The filing of this action within ninety days after receipt of the Notice of Right to Sue Letter from the E.E.O.C. properly invoked the jurisdiction of this court.

In furtherance of her Title VII claim, the plaintiff has alleged that concerning her assignment of overtime work she was treated differently than the male janitors because of her sex and national origin. When disparate treatment is alleged a plaintiff must prove "(1) differences in treatment, and (2) a *discriminatory motive on the part of her employer.*" (Emphasis added.) *Underwood v. Jefferson Memorial Hospital*, 639 F.2d 455, 457 (8th Cir. 1981), *citing, International Brotherhood of Teamsters*

v. United States, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In this action, Mrs. Rathbun has failed to show either of the required elements to establish a claim of discrimination predicated upon sex or national origin. The issue of overtime is, in great measure, concerned with the assignment of overtime hours in conjunction with athletic department affairs. It is clear that the janitor or custodian immediately assigned to the field in which a given athletic event was scheduled had firstcall on the employment in question. His (or her) familiarity with the building or field was the primary consideration of selecting him to work. This criteria was not based upon sex or national origin. The evidence is clear that additional workers were hired on a seniority basis with older employees in favor of service being given preference. As a general rule substitutes did not work overtime hours. Mrs. Rathbun, even in that capacity, did work and was paid though she may well have worked fewer hours than many of her male counterparts. Nothing in the evidence adduced establishes a prima facie case which supports her contention that she was denied either work or pay as a result of her sex or national origin. *Underwood v. Jefferson Memorial Hosp. supra*.

The same is true in relation to her transfer from Harding to Devon Elementary. The latter, staffed by one night janitor (Mrs. Rathbun) and one custodian was, by comparison to the high school, a small unit and work there offered small opportunity for overtime work. In the years during which plaintiff worked at Devon, she worked little extra time; those years were also ones during which the fiscal policies of the system itself were subjected to belt-

tightening efforts to reduce overtime pay. Nothing said concerning Mrs. Rathbun's employment at Devon persuades the court that while there, she was denied the opportunity to accrue overtime hours because of her sex and/or national origin.

To reach conclusions in relation to the issue—as well as to all issues raised by plaintiff and one which she has the burden of original proof—the court must determine the credibility of each witness who appeared during the course of trial. Plaintiff herself is subjected to the same testimony process. The determination of this question is vital to the reaching of this decision.

There is no doubt that plaintiff was physically assaulted by a member of the Harding janitorial staff. The degree of her injuries is open to some question. Other complaints of harassment were made by plaintiff and evidence was adduced concerning the physical affect (not the cause) of the actions of one or more persons unknown to plaintiff and therefore to the court.

To attribute to defendants or others associated with them—or any of them—the acts of making obscene phone calls, placing razor blades in plaintiff's soap supplies, frightening her during working hours, stretches the power of the court to make such attributions on the basis of the evidence before it.

But harassment and intimidation take many forms, some much more subtle than those instances referred to above. Plaintiff complains that fellow employees referred to her as a "French Bitch," that her work assignments were such as to isolate her, and that defendants, or some of them, established a pattern of intimidation and fear.

The evidence is clearly to the contrary. Reasonable minds, hearing the testimony of plaintiff and her witnesses could not disagree that her transfer to Devon from Harding was not motivated by her sex or nationality but to remove her from a position in which her troubles with her fellow janitor and custodian had begun to affect the morale of the entire Harding staff. There is no evidence that plaintiff's work was anything but good while employed at any post assigned to her: East Junior High, Harding High School or Devon. But while her personal testimony elicits discriminatory and sexist statements of men fellow employees, her own witnesses negate such charges with their statements concerning the same incidents. In the face of such evidence, there is no reason to believe that her transfer from one school to another was some form of punishment imposed upon her because of her work related activities. It should be added that even if statements were made to plaintiff by her fellow employees as claimed, such statements were isolated in nature and hardly assume Constitutional proportion.

The totality of the evidence establishes further that certain complaints of plaintiff were brought to the attention of the Board of Education on at least one occasion. In 1978, Nick Angelo was contacted by the Ohio Civil Rights Commission and gave it certain paperwork and records pertaining to plaintiff at that time. It is Mr. Angelo's belief that he met with members of the Board and school and administrative staff. Minutes of the meeting were taken by the secretary of the union (not the Board secretary). These minutes are not present in evidence. During the period 1978-9, Mr. Angelo "probably" had conversations concerning plaintiff with various mem-

bers of the Board of Education. The content of these conversations is not known with any specificity. In sum, the record is absolutely barren of any evidence whatsoever indicative of the fact that the Board, the acknowledged employer of plaintiff in this case, did anything to discriminate against plaintiff. Indeed, if the Board were made aware of any acts of claimed discrimination, we are not privy to that awareness. Further, in the same vein, there is no evidence to indicate that individual Board members acted in any manner to suggest that they should be encumbered with personal liability to plaintiff in this cause. Lastly, there is no evidence tending to indicate that the Board, or any member thereof, acted so as to participate or encourage or ratify that conduct, if any, which could have been considered violative of plaintiff's Constitutional rights.

Accordingly, the plaintiff's claims are hereby dismissed with prejudice to Rule 41(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

/s/ Sam H. Bell
U. S. DISTRICT JUDGE

App. 73

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 85-3986/3987

IN RE: ALAN MILES RUBEN,

Attorney-Appellant (85-3987).

JEANNE RATHBUN,

Plaintiff-Appellant (85-3986),

v.

WARREN CITY SCHOOLS, et al.,

Defendants-Appellees.

Before: WELLFORD and NORRIS, Circuit Judges; and
COHN District Judge.

JUDGMENT

(July 30, 1987)

ON APPEAL from the United States District Court
for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from
the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this court that the judgment of
the said district court in this case be and the same is here-
by reversed as to the sanctions against plaintiff and her
attorney and taxation of costs against plaintiff, and re-
mand the case for further consideration not inconsistent
with this opinion.

IT IS FURTHER ORDERED that Appellants recover from Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ John P. Hehman
Clerk

(SEAL)

A True Copy.

Issued as Mandate: August 25, 1987

Attest:

/s/ Gary McCarthy
Deputy Clerk

COSTS:	None
Filing fee	\$
Printing	\$
Total	\$



(2) (2)
Nos. 87-710, 87-735



In the Supreme Court of the United States
October Term, 1987

CATHERINE O. SWAN, et al.,
Petitioners,

v:

ALAN MILES RUBEN, et al.,
Respondents

WARREN CITY SCHOOL DISTRICT BOARD OF
EDUCATION, et al.

v.

ALAN MILES RUBEN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RESPONDENT RATHBUN'S BRIEF IN OPPOSITION

Libert Pinto, Esq.
Suite 2222
The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
Counsel for Respondent Rathbun
February 15, 1988

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the reversal of a trial judge's award of attorney fees against an unsuccessful Title VII plaintiff on the ground of abuse of discretion presents an important question worthy of review when the error allegedly committed by the Court of Appeals involves only an asserted factual misapplication of this Court's Roadway Express and Christiansburg Garment Co. standards?

2. Whether Petitioner Board of Education has waived its right to seek review of the reversal of a trial judge's award of attorneys fees against an unsuccessful Title VII plaintiff when its petition relies solely upon 28 U.S.C. §1927 as a basis for plaintiff's liability and this provision applies only to attorneys?

3. Whether the individual Board of Education member Petitioners, who were sued only in their official, representative capacities, have independent standing to seek review?

4. Whether the Court of Appeals made an appropriate factual application of the "bad faith" standard for an award of attorney fees set forth in this Court's Roadway Express decision?

5. Whether the Court below made an appropriate factual application of the objective test of non-frivolousness adopted by this Court in its Christiansburg Garment Co. decision?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
COUNTER-STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE WRIT.....	9
I. PETITIONERS SWAN, <u>ET AL.</u> , WHO WERE SUED ONLY IN THEIR OFFICIAL CAPACITIES, HAVE NO STANDING TO PURSUE THIS LITIGATION.....	9
II. 28 U.S.C. §1927 ONLY APPLIES TO ATTORNEYS AND THE PETITIONER BOARD OF EDUCATION HAS WAIVED ANY OTHER ARGUMENT SUPPORTING LIABILITY OF RESPONDENT RATHBUN.....	11
III. THE COURT BELOW PROPERLY APPLIED THE "BAD FAITH" STANDARD ADOPTED IN <u>ROADWAY EXPRESS, INC. V.</u> <u>PIPER</u>	13
IV. THE COURT BELOW PROPERLY APPLIED THE OBJECTIVE TEST OF NON-FRIVOLOUSNESS ADOPTED IN <u>CHRISTIANSBURG</u> <u>GARMENT CO. V. EQUAL EMPLOY-</u> <u>MENT OPPORTUNITY COMMISSION.</u>	17
CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<u>Badillo v. Central Steel & Wire</u> <u>Co., 717 F.2d 1160</u> <u>(7th Cir. 1983).....</u>	14, 19
<u>Bender v. Williamsport Area</u> <u>District, U.S., 106</u> <u>S.Ct. 1326 (1986).....</u>	9
<u>Bowers v. Kraft Foods Corp.,</u> <u>606 F.2d 816 (8th Cir. 1979)..</u>	14
<u>Browning Debenture Holders</u> <u>Committee v. DASA Corp.,</u> <u>560 F.2d 1078 (2d Cir. 1977)..</u>	15
<u>Christiansburg Garment Co. v.</u> <u>EEOC, 434 U.S. 412 (1978).....</u>	17, 18, 19, 21
<u>EEOC V. Freuhauf Corp.,</u> <u>609 F.2d 424 (10th Cir. 1979).</u>	14, 19
<u>FTC V. Alaska Land Leasing, Inc.,</u> <u>799 F.2d 507 (9th Cir. 1986),</u> <u>cert. denied, 107 S.Ct. 1373</u> <u>(1986).....</u>	11
<u>1507 Corp. v. Henderson,</u> <u>447 F.2d 540 (7th Cir.</u> <u>1971).....</u>	12
<u>Ford v. Temple Hospital,</u> <u>790 F.2d 342 (3rd Cir. 1986)..</u>	15

<u>Hughes v. Rowe, 449 U.S. 5</u> (1980).....	21
<u>Jones v. Continental Corp., 789</u> F.2d 1225 (6th Cir. 1986).....	15
<u>Kentucky v. Graham, 473 U.S.</u> 159 (1985).....	9, 15 22
<u>Mitchell v. Office of Los</u> <u>Angeles County Sup't of</u> <u>Schools, 805 F.2d 844</u> (9th Cir. 1986).....	14, 19
<u>Monell v. New York City Dep't</u> <u>of Social Services, 436</u> U.S. 658 (1978).....	10, 15 22
<u>Oliveri v. Thompson, 803</u> F.2d 1265 (2d Cir. 1986) cert. denied, 107 S.Ct. 1373 (1986).....	11
<u>Roadway Express, Inc. v. Piper,</u> 447 U.S. 752 (1980).....	13
<u>Southeastern Express Co.</u> <u>Co. v. Robertson, 264</u> U.S. 541 (1924).....	12

Statutes and Rules

28 U.S.C. section 1927.....	11, 12
42 U.S.C. Sections 2000e <u>et seq.</u> ..	4, 7
F.R.C.P. No. 41(b).....	5



BRIEF IN OPPOSITION FOR RESPONDENT RATHBUN

Respondent Jeanne Rathbun respectfully requests that this Court deny the petitions for certiorari filed by petitioners Warren City School District Board of Education, et al., and Catherine O. Swan, et al., to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

COUNTER-STATEMENT OF THE CASE

This case does not present any issue, constitutional or otherwise, deserving review. Instead, it involves a mere factual issue, peculiar to this particular litigation, whether the trial judge abused his discretion by awarding counsel fees to defendants in a Title VII action.

Jeanne Rathbun is a female naturalized citizen of the United States who was employed by petitioner Warren City School District Board of Education (hereinafter

"Board of Education") as a janitor at all times relevant herein. During her employment she was repeatedly referred to as "French bitch" and was allegedly told by a male co-worker, "French bitch ... all they're good for is to fuck men and give syphilis to men". There was trial testimony that she made this verbal abuse known to her superiors and the school board (App. 16).^{*} Respondent Rathbun was the victim of one violent attack (App. 67) and allegedly the victim of a second violent attack by male co-workers (App.16). The job-site harassment of the plaintiff was so severe that an investigation by the Federal Bureau of Investigation was conducted (App.68). In addition, Rathbun alleged that she was denied equal overtime

^{*}References to "App." are to the identical appendices to the Petitions for Writ of Certiorari filed herein.

opportunities and subjected to disparate workloads and a retaliatory transfer.

(App.2). Both courts below found that "Rathbun's superiors considered certain work that she was capable of doing "man's work". (App. 16, 66). "[N]either did the the basis for her case rest entirely on her own testimony." (App. 16).

Respondent Rathbun filed charges of discrimination with the Ohio Civil Rights Commission ("OCRC") in September, 1978 and the Equal Employment Opportunity Commission in October, 1978. In March 1979, the OCRC, on the basis of Findings of Fact, a four page Summary of the Evidence, and a voluminous Index of Attachments which included numerous witness statements from Rathbun's co-workers, found probable cause that petitioner Board of Education had engaged in unlawful discrimination.

(App. 3). In July 1980 the EEOC issued a right-to-sue letter to Rathbun. (App.3).

On October 16, 1980, attorneys Sheneyey, Berman and Abakumov timely filed a Complaint on behalf of respondent Rathbun in the United States District Court for the Northern District of Ohio alleging violations of 42 U.S.C. §2000e, et seq. Petitioner Board of Education¹ and the Petitioner members of the Board of Education, Catherine O. Swan, et al., (hereinafter "Board Members") were named as Defendants. Petitioner Board Members were sued solely in their official representative capacities (App.4, 16 n.6). In 1981 Sheneyey, Berman and Abakumov with-

¹Also named as Defendants were employees of the Board of Education but neither court below and neither Petition for Writ of Certiorari attached significance to this fact.

drew as counsel for Rathbun for reasons unrelated to the merits of her case and she was thereafter represented by Elliott Lester. Respondent Alan Miles Ruben appeared for Rathbun as "additional counsel" several months later. (App.4).

Two Motions to Dismiss and two Motions for Summary Judgment filed on behalf of Defendant were denied prior to the commencement of trial (App. 22-23).² On June 29, 1984, following four days of trial, the district judge dismissed the action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. On

²A Motion for Summary Judgment was granted as to Defendants Pegues and Berarducci but this is not relevant herein for the reason noted by the Court of Appeals (App. 23 n.8).

July 6, 1984, Findings of Fact and Conclusions of Law, containing no suggestion that Rathbun's action was frivolous or filed or prosecuted in bad faith, were filed. The Order of Dismissal was filed July 10, 1984.

On October 30, 1984, Petitioner Board Members who had been sued only in their official, representative capacities, filed a Motion for Attorney Fees. Petitioner Board of Education filed its Motion for Attorney Fees on January 9, 1985 (App.5). On October 22, 1985 the district judge entered an Order and Opinion granting both Motions for Attorney Fees in their entirety, (App. 5), despite the fact that no Affidavit supporting an Attorney Fee Motion was ever filed by counsel for Petitioner Board of Education (App. 29 n.15). The total amount of

attorney fees ordered to be paid by respondent Rathbun was \$36,159.21. (App.6).

"[T]he district judge did not clearly delineate the legal grounds for sanctioning Rathbun...." (App.6). The district judge did refer to 28 U.S.C. §1927, 42 U.S.C. §2000e-5(k) and the court's inherent powers. It is clear, however, that the district judge awarded petitioners all of their legal fees from the very inception of the action. (App. 57-58). Explicitly finding that the applicable standard of review was that of abuse of discretion, (App.14-15), the United States Court of Appeals for the Sixth Circuit reversed and remanded for reconsideration of Rathbun's liability for

defendants' costs.³

³Petitioners have not included in the appendices any Order imposing costs on respondent Rathbun for the simple reason that no such Order exists.

REASONS FOR DENYING THE WRIT

- I. PETITIONERS SWAN, ET AL., WHO WERE SUED ONLY IN THEIR OFFICIAL CAPACITIES, HAVE NO STANDING TO PURSUE THIS LITIGATION.

In Bender v. Williamsport Area District, U.S., 106 S.Ct. 1326, 1332 (1986), this Court held:

[A] Member of the School Board sued in his official capacity... has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal.

In this case the Board Member petitioners were sued only in their official representative capacities as members of the petitioner Board of Education (App.4, 16,n.6). Thus, the lawsuit in reality was "not a suit against the official[s] personally, for the real party in interest is the entity." Kentucky v. Graham, 473 U.S. 159, 167,n.14, (1985), (emphasis in original). See also

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 n.55 (1978).

Thus, the clearly erroneous award of attorney fees to the Board Member petitioners in their individual capacities by the district court (App.16, n.6) was void for want of jurisdiction and the Board Member petitioners lack standing in their individual capacities to pursue the instant petition.

II. 28 U.S.C. §1927 ONLY APPLIES TO ATTORNEYS AND THE PETITIONER BOARD OF EDUCATION HAS WAIVED ANY OTHER ARGUMENT SUPPORTING LIABILITY OF RESPONDENT RATHBUN

28 U.S.C. §1927 is captioned "Counsel's liability for excessive costs" and explicitly provides for the imposition of an attorney fee award only on an "attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof." Respondent Rathbun is not an attorney and did not act as counsel in the instant litigation; instead she was a janitor plaintiff in the underlying Title VII action. Every court which has considered the issue has found, consistently with the express statutory language, that only an attorney can be sanctioned under 28 U.S.C. §1927. See, e.g., Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986); FTC v.

Alaska Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986) cert. denied, 107 S.Ct. 1373 (1986); 1507 Corp. v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971). No award against respondent Rathbun could be properly based on 28 U.S.C. §1927.

Petitioner Board of Education devotes its entire "Why the Writ Should be Granted" section of its petition to a discussion of 28 U.S.C. §1927 and mentions no other basis for the district court fee order against respondent Rathbun. Thus any other basis has been waived by petitioner Board of Education. Southeastern Express Co. v. Robertson, 264 U.S. 541, 542 (1924).

III. THE COURT BELOW PROPERLY APPLIED
THE "BAD FAITH" STANDARD ADOPTED
IN ROADWAY EXPRESS, INC. V. PIPER

The Court of Appeals for the Sixth Circuit correctly stated the "bad faith" standard for an award of attorney fees set forth in Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67 (1980). (App.10). The argument of petitioner Board Members is simply that the Court of Appeals misapplied this Court's standard to the particular facts of this case. Such an issue of factual application does not merit review by this Court.

The Court of Appeals correctly applied the Roadway Express "bad faith" test in this case. The district judge, in awarding attorney fee sanctions against respondent Rathbun, "did not even consider the fact that the OCRC had issued a probable cause finding against the school

board...." (App. 16). The Court of Appeals gave proper weight to the "probable cause" finding. No Court has ever imposed sanctions on the ground that a Title VII action was frivolous or filed in "bad faith" following an administrative determination of probable cause. See, e.g., Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983); Bowers v. Kraft Foods Corp. 606 F.2d 816 (8th Cir. 1979); Mitchell v. Office of Los Angeles County Sup't of Schools, 805 F. 2d 844 (9th Cir. 1986); EEOC v. Freuhauf Corp., 609 F.2d 434 (10th Cir. 1979).

The petitioner Board Members were sued only in their representative capacities (App. 16n.6). Thus, the probable cause finding against the Board of Education was in fact a finding against the Board Members in their official

capacities. Cf. Kentucky v. Graham, 473 U.S. 159, 167n.14 (1985); Monell v. New York City Dep't of Social Services, 436 U.S. 658,690 n.55 (1978).

The Court of Appeals was also correct that the favorable rulings for respondent Rathbun on defendants' two Motions for Summary Judgment and two Motions to Dismiss strongly rebut any findings of bad faith by respondent. See, e.g., Jones v. Continental Corp., 789 F.2d 1225,1231 n.4 (6th Cir. 1986); Ford v. Temple Hospital, 790 F.2d 342,349 (3rd Cir. 1988); Browning Debenture Holders Committee v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977).

Most importantly, respondent Rathbun presented evidence at trial to support her Title VII claims. As the Court of Appeals noted, "...neither did

the basis for her case rest entirely on her own testimony." (App.16). On this record, the Court of Appeals was clearly correct in concluding that respondent Rathbun did not act in "bad faith" in prosecuting this action and that the district judge abused his discretion by holding otherwise.

IV. THE COURT BELOW PROPERLY APPLIED
THE OBJECTIVE TEST OF NON-
FRIVOLOUSNESS ADOPTED IN CHRISTIANS-
BURG GARMENT CO. v. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Petitioner Board Members argue that the United States Court of Appeals for the Sixth Circuit misapplied this Court's standard for awarding attorney fees against a Title VII plaintiff as set forth in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978) by relying on respondent Rathbun's subjective mental state rather than an objective analysis of whether her case "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Id. at 421. Petitioners' argument is both implausible and based on a rather tortured misreading of the opinion of the Court of Appeals.

A proper reading of

the Court of Appeals' opinion in this case demonstrates that the objective test mandated by Christiansburg Garment Co., supra, was applied and applied correctly. The Court of Appeals quoted the operative language of Christiansburg Garment Co. (App. 14, 19). Immediately after doing so the Court of Appeals held that "this standard does not support an award of attorney fees against Rathbun." (App. 14). The Court below did not rest on the subjective belief of respondent Rathbun but instead explicitly found that "[s]he had some foundation for believing that she had been discriminated against" (App. 19) and "certainly had a sufficient basis for continuing her claims...." (App. 20). (emphasis added).

Simply stated, respondent Rathbun's Title VII case was not "frivolous, unreasonable, or without foundation."

Christiansburg Garment Co., supra at 421.

The fee sanction imposed by the trial judge was a clear abuse of discretion and the Court of Appeals so held. (App. 14, 20). The trial judge failed to even "consider the fact that the OCRC had issued a probable cause finding against the school board...." (App. 16). The Sixth Circuit followed every other circuit in finding that an administrative finding of probable cause "lends support" to the conclusion that a Title VII action is not frivolous. (App. 17). See, e.g., Mitchell v. Office of Los Angeles County Sup't. of Schools, 805 F.2d 844 (9th Cir. 1986); Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983); EEOC v. Freuhauf Corp., 609 F.2d 434 (10th Cir. 1979). The Court of Appeals correctly found that the fact that two

8
Motions to Dismiss and two Motions for Summary Judgment filed by defendants were denied was a further indication of non-frivolousness. (App. 22-23). This relevant fact simply was ignored by the trial judge. The trial judge also ignored the fact that four attorneys and a law professor found her case meritorious, certainly a relevant consideration on the issue of alleged frivolousness. (App. 19-20). The trial judge erroneously found that there was no evidence to support respondent Rathbun's Title VII action. In contrast, the Court of Appeals held that there was some evidence to support her claims and "neither did the basis for her case rest entirely on her own testimony." (App. 16).

The trial judge found that no briefs were filed on the attorney fee sanction issue when in fact the opposite was true.

(App. 15). This lack of awareness of the briefs filed on behalf of respondent Rathbun perhaps explains the trial judge's numerous errors of fact and law. Finally, the fact that the trial judge never suggested that the action was frivolous in his original Findings of Fact and Conclusions of Law (App. 4n.2) strongly suggests that his decision was impermissibly based on hindsight and the mere fact that respondent Rathbun's lawsuit was ultimately unsuccessful. See, e.g., Hughes v. Rowe, 449 U.S. 5, 14 (1980); Christiansburg Garment Co., supra at 421-22.

The argument of petitioner Board Members that all of these considerations apply only to petitioner Board of Education is both factually and legally erroneous. In fact, there was evidence inculcating the petitioner Board Members

presented at the trial. (App. 16) More importantly the evidence presented at trial and the OCRC probable cause finding against petitioner Board of Education was applicable to petitioner Board Members as a matter of established law. Petitioner Board Members were sued only in their official, representative capacities.

(App. 4, 16n.6) In such a case the lawsuit was "not a suit against the official[s] personally, for the real party in interest is the entity."

Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985) (emphasis in original). See also, Monell v. New York City Dep't of Social Services, 436 U.S. 658, 690 n.55 (1978). Since the petitioner Board Members were sued only in their official capacities no evidence against them in their personal capacities was necessary or appropriate.

CONCLUSION

Respondent respectfully submits that this case presents no issue worthy of review by this Court and that the petitions for writs of certiorari should be denied.

Respectfully submitted,

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(3) (3)
Nos. 87-710, 87-735

U.S. Court, U.S.
FILED
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CLERK

In the Supreme Court of the United States
October Term, 1987

CATHERINE O. SWAN, et al.,
Petitioners,

v:

ALAN MILES RUBEN, et al.,
Respondents

WARREN CITY SCHOOL DISTRICT BOARD OF
EDUCATION, et al.

v.

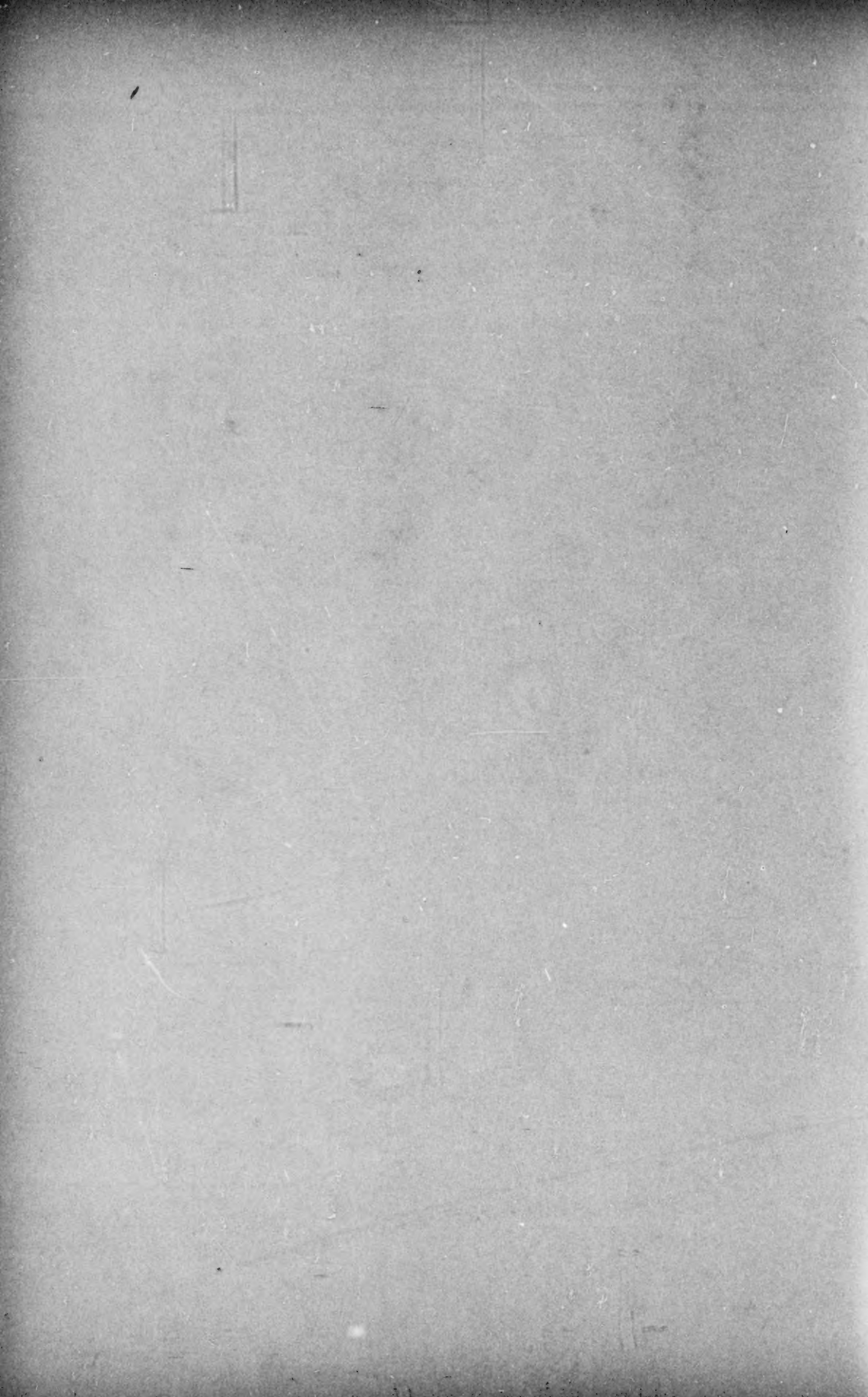
ALAN MILES RUBEN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RESPONDENT RUBEN'S BRIEF IN OPPOSITION

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28



COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the reversal of a trial judge's award of attorney fees to counsel for defendants against an "additional," second chair, attorney for the unsuccessful plaintiff in a Title VII action, on the ground of abuse of discretion, presents an important question worthy of review when the error allegedly committed by the Court of Appeals involves only an asserted factual misapplication of 28 U.S.C. §1927 and this Court's Roadway Express standard?

2. Whether the individual Board of Education member Petitioners, who were sued only in their official, representative capacities, have independent standing to seek review?

3. Whether the Court of Appeals made an appropriate factual application of the "bad faith" standard for an award of

attorney fees set forth in this Court's
Roadway Express decision?

4. Whether the Court of Appeals made an appropriate factual application of standards set forth in 28 U.S.C. §1927 for the award of counsel fees and costs and remanded the case to the District Court for specific findings as to any alleged acts of misconduct and any excess fees and costs incurred as a result?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
COUNTER-STATEMENT OF THE CASE....	1
REASONS FOR DENYING THE WRIT.....	9
I. PETITIONERS SWAN, <u>ET AL.</u> , WHO WERE SUED ONLY IN THEIR OFFICIAL CAPACITIES, HAVE NO STANDING TO PURSUE THIS LITIGATION.....	9
II. THE COURT BELOW PROPERLY APPLIED THE "BAD FAITH" STANDARD ADOPTED IN <u>ROADWAY EXPRESS, INC. vs.</u> <u>PIPER</u>	11
III. THE COURT BELOW PROPERLY APPLIED 28 USC §1927 AND REMANDED THE CASE TO THE DISTRICT COURT FOR SPECI- FIC FINDINGS.....	15
CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases

<u>Braley v. Campbell,</u> 832 F.2d 1504 (10th Cir. 1987)...	16, 19
<u>Bender v. Williamsport Area</u> District, 475 U.S.-, 106 S.Ct. 1326 (1986).....	9
<u>Estates of Blas v. Winkler,</u> 792 F.2d 858 (9th Cir. 1986)....	19
<u>Ford v. Temple Hospital,</u> 790 F.2d 342 (3d Cir. 1986)	18
<u>Indianapolis Colts v. Mayor &</u> <u>City Council of Baltimore,</u> 775 F.2d 177 (7th Cir. 1985)....	18-19
<u>Jones v. Continental Corp.,</u> 789 F.2d 1225 (6th Cir. 1986)...	18
<u>Kentucky v. Graham,</u> 473 U.S. 159 (1985).....	9, 13
<u>Knorr Brake Co. v. Harbil, Inc.,</u> 738 F.2d 223 (7th Cir. 1984)....	19
<u>Lewis v. Brown & Root, Inc.,</u> 711 F.2d 1287 (5th Cir. 1983), <u>aff'd in part on reconsidera-</u> <u>tion,</u> 722 F.2d 209 (5th Cir. 1984), <u>cert. denied,</u> 467 U.S. 1231 (1984).....	18
<u>Monell v. New York City Dept.</u> <u>of Social Services,</u> 436 U.S. 658 (1978).....	10

<u>Roadway Express v. Piper,</u>	
447 U.S. 752 (1980).....	11, 12 13, 14

<u>Westinghouse Electric Corp.</u>	
<u>v. NLRB, 809 F.2d 419</u>	
(7th Cir. 1987).....	19

Statutes and Rules

29 U.S.C. Section 1927.....	7, 8, 15, 16, 17, 19
Title VII, 42 U.S.C. Section	
2000e <u>et seq.</u>	1, 3
F.R.C.P. No. 41(b).....	5

Other Authorities

H.R. Rep. No. 1234, 96th Cong.,	
2d Sess. 8, <u>reprinted in</u> 1980	
U.S. Code Con. & Ad. News,	
2716.....	16
<u>Petition of Warren City School</u>	
<u>District Board of Education...</u>	18
<u>Petition of Catherine O. Swan....</u>	18

BRIEF IN OPPOSITION FOR RESPONDENT RUBEN

Respondent Alan Miles Ruben respectfully requests that this Court deny the petitions for writs of certiorari filed by petitioners Warren City School District Board of Education, et al., and Catherine O. Swan, et al., to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

COUNTER-STATEMENT OF THE CASE

This case does not present any issue, constitutional or otherwise, deserving review. Instead, it involves a mere factual question, peculiar to the protracted litigation herein, whether the trial judge abused his discretion in awarding attorney fees to counsel for defendants against an "additional", second chair, attorney for the plaintiff in a Title VII action.

The Title VII plaintiff, Jeanne Rathbun, is a female naturalized citizen of the United States who was employed by petitioner Warren City School District Board of Education as a janitor. During her employment she was victimized by two violent attacks, one sexual in nature, and "derogatory language . . . based on her sex and national origin that she made

known to her superiors and the school board." (App. 16).^{*} Both courts below concluded that plaintiff's "superiors considered certain work that she was capable of doing 'man's work.'" (App. 16,66). In addition, Plaintiff Rathbun alleged that she was denied equal over-time opportunities and subjected to disparate workloads and a retaliatory transfer.

Plaintiff Rathbun filed charges of discrimination with the Ohio Civil Rights Commission ("OCRC") in September 1978 and the Equal Employment Opportunity Commission ("EEOC") in October 1978. In March 1979, the OCRC, on the basis of Findings of Fact, a four-page Summary of the

^{*}References to "App." are to the identical appendices to the petitions for writs of certiorari filed herein.

Evidence, and a voluminous Index of Attachments which included witness statements from many of Rathbun's co-workers, found probable cause that the Warren City School District Board of Education had engaged in unlawful discrimination. (App.3).

On October 16, 1980, attorneys Shenyey, Berman and Abakumov timely filed a Title VII Complaint on behalf of Plaintiff Rathbun in the United States District Court for the Northern District of Ohio. (App.3). Insofar as is relevant here, plaintiff named as defendants Warren City School District Board of Education (hereinafter "Board of Education") and the members of the Board of Education, Catherine O. Swan, et al.,

(hereinafter "Board Members")¹, who were sued only in their official representative capacities. (App. 16n.6).

In 1981 Shenyey, Berman and Abakumov withdrew as counsel for plaintiff for reasons unrelated to the merits of the case. (App.4). Attorney Elliott Lester then entered his appearance as counsel for plaintiff Rathbun. Several months later, respondent Alan Miles Ruben entered his appearance as "additional counsel." (App.4).

Prior to the commencement of the trial two motions to dismiss and two motions for summary judgment were filed

1. Employees of the Board of Education were also named as defendants, but neither the District Court or the Court of Appeals attached significance to this fact and neither petition for a writ of certiorari paid any attention to it.

by defendants in the case and denied.² (App.22-23). After four days of trial, the district judge dismissed the action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on June 29, 1984. Findings of fact and conclusions of law, which contained no suggestion that plaintiff's action was frivolous or instituted or prosecuted in bad faith, were filed on July 6, 1984. (App.4,n.2). The Order of Dismissal was filed July 10, 1984.

A motion for attorney fees was filed by the Board Members, who had been sued only in their representative capacities, on October 30, 1984. The Board of

2. A motion for summary judgment was granted as to employee defendants Pegues and Berarducci, but this is not relevant herein for the reasons noted by the Court of Appeals. (App.23,n.8).

Education filed its motion for attorney fees on January 9, 1985. On October 22, 1985 the district judge entered an Order and Opinion granting both defendants' motions in their entirety (App.5), despite the fact that no affidavit to support its fee request was ever filed by counsel for the Board of Education (App. 29,n.15). The Court ordered Respondent Ruben to pay each petitioner \$2,500.00 in attorney fees (App.5).³ The order of the district judge "does not clearly delineate the legal grounds for sanctioning Ruben". (App.5).

3. No fees were sought or ordered against attorneys Shenyey, Berman and Abakumov, who originally represented Plaintiff Rathbun. Attorney Lester was sanctioned in the amount of \$5,000.00 and Attorney Weiner in the amount of \$500.00. Plaintiff Rathbun was ordered to pay \$36,159.21 in defense fees (App.5-6).

What is clear, however, is that the district judge awarded the petitioners all their legal fees from the very inception of the action and long before respondent Ruben entered his limited appearance in the case. (App.29n.15,57).

The United States Court of Appeals for the Sixth Circuit reversed and remanded (App.30). Since Ruben was not counsel in the case until long after it was filed, the Court of Appeals reached the obvious conclusion that the district judge abused his discretion by awarding fees, under 28 USC §1927 or the court's inherent power, for wrongfully instituting the lawsuit (App.21). As to any alleged misconduct in the prosecution of the lawsuit the Court of Appeals remanded the case to the district judge to "require defendants' attorneys to

amend their motions to identify the claimed misconduct by Ruben and the extra efforts required by them as a result." (App.30). The Court of Appeals explicitly left open the possibility that the district judge could impose sanctions against Ruben pursuant to the court's inherent power or 28 USC §1927.

REASONS FOR DENYING THE WRIT

- I. PETITIONERS SWAN, ET AL., WHO WERE SUED ONLY IN THEIR OFFICIAL CAPACITIES, HAVE NO STANDING TO PURSUE THIS LITIGATION.

In Bender v. Williamsport Area District, U.S., 106 S.Ct. 1326, 1332 (1986), this Court held:

[A] Member of the School Board sued in his official capacity... has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal.

In this case the Board Member petitioners were sued only in their official representative capacities as members of the petitioner Board of Education (App.4, 16,n.6). Thus, the lawsuit in reality was "not a suit against the official[s] personally, for the real party in interest is the entity." Kentucky v. Graham, 473 U.S. 159, 167,n.14, (1985), (emphasis in original). See also

Monell v. New York City Dept. of Social Services, 436 U.S. 658,690 n.55 (1978).

Thus, the clearly erroneous award of attorney fees to the Board Member petitioners in their individual capacities by the district court (App.16, n.6) was void for want of jurisdiction and the Board Member petitioners lack standing in their individual capacities to pursue the instant petition.

II. THE COURT BELOW PROPERLY APPLIED
THE "BAD FAITH" STANDARD ADOPTED
IN ROADWAY EXPRESS, INC. vs.
PIPER.

In Roadway Express, Inc. v. Piper,
447 U.S. 752,767 (1980), this Court

held that a trial court must make "a
specific finding as to whether counsel's
conduct in [the] case constituted or was
tantamount to bad faith, a finding that
would have to precede any sanction under
the court's inherent powers." (footnotes
& citations omitted).

The United States Court of Appeals
for the Sixth Circuit correctly stated
the legal test mandated by Roadway
Express (App.10). Indeed, the sole
complaint of petitioners is that the
Court of Appeals allegedly misapplied
the Roadway Express standard. There is
no basis for petitioners' position.

The trial court was clearly erroneous in sanctioning respondent Ruben for bad faith in instituting the lawsuit when he was not counsel until over a year after the Complaint was filed. (App.21). It was also an abuse of discretion for the district court to find that respondent Ruben entered the action in bad faith. As the Court of Appeals noted "no evidence clearly contradicted [his] client's statements at the time [he] undertook representation" and, indeed, "Rathbun's statements were corroborated by the OCRC's finding that other evidence supported a discrimination action." (App.21).

The Court of Appeals recognized that Roadway Express permits sanctions for "bad faith" misconduct in the course of the litigation by an attorney but found

that in the present case "the basis for the district Judge's sanction against Ruben is not clearly delineated" (App.27) and then remanded the case to the district court for further proceedings in this issue (App.30). Clearly, this was proper and consistent with Roadway Express.

Petitioner's more specific allegations of error are spurious. The Board Member petitioners assert that no OCRC "probable cause" finding was made as to them. In fact, they were sued only in their representative capacities and the suit was in reality only against the petitioner Board of Education (App.4,16, n.6). Kentucky v. Graham, supra. Thus, the OCRC "probable cause" finding was binding on the Board Member defendants in their official capacity, the only

capacity in which they were parties to the lawsuit.

The Board Member petitioners also claim that the Court of Appeals erroneously required a warning to counsel prior to the imposition of sanctions. Although the Court of Appeals suggested warnings as good practice (App.28), no such requirement was imposed and, indeed, the case was remanded to the district court for further proceedings even though no warnings were ever given to respondent Ruben. (App.30.)

This was not a case where there was no evidence of illegal discrimination by the petitioners. The Court of Appeals correctly applied Roadway Express when it remanded the case to the district court for specific findings of "bad faith" misconduct by respondent Ruben.

III. THE COURT BELOW PROPERLY APPLIED 28 USC §1927 AND REMANDED THE CASE TO THE DISTRICT COURT FOR SPECIFIC FINDINGS.

28 U.S.C. §1927 provides:

"Counsel's liability for excessive costs. Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct."

The Court of Appeals made an obviously correct decision when it remanded the case and required the petitioners to "identify the alleged acts of misconduct by Ruben and the extra efforts required by [counsel for petitioners] as a result." (App.30) First, 28 U.S.C. §1927 explicitly applies

only where attorney misconduct "multiplies the proceedings." Second, the very terms of §1927 and its legislative history clearly provide that an errant attorney may only be sanctioned to the extent of the "excess costs, expenses, and attorneys' fees reasonably incurred because of such [dilatory] conduct." See H.R. Rep. No. 1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. Code Con. & Ad. News 2716,2781,2782. See also Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987).

In this case the district court abused its discretion, as the Court of Appeals held, by awarding petitioners all their legal fees from the very inception of the lawsuit and long before respondent Ruben entered his appearance in the case (App. 29 n.15,57). The district court violated both of the explicit statutory

commands of §1927 by failing to identify any specific multiplication of the proceedings and failing to identify any "excess" costs or attorney fees incurred by the petitioners. It would be a waste of this Court's precious and limited judicial resources to reaffirm the express statutory language of 28 U.S.C. §1927. This is especially true where, as in this case, petitioners have been unable to identify a single lower court decision conflicting with the Court of Appeals decision herein on these two explicit statutory requirements of §1927.

Unable to identify any conflict between the circuits relevant to the central questions in this case, petitioners instead focus on the ancilliary issue of "whether negligence as opposed to the intentional misconduct

will support a sanction under 28 U.S.C. §1927." Petition of Catherine O. Swan, et al., at 25; See also, Petition of Warren City School District Board of Education, et al., at 11-13. The vast majority of circuits which have addressed this issue have reached the same result as the Sixth Circuit below and have utilized an objective test requiring that the attorney's conduct be without plausible legal or factual foundation. See, e.g., Ford v. Temple Hospital, 790 F.2d 342 (3d Cir. 1986); Lewis v. Brown & Root, Inc., 711 F.2d 1287 (5th Cir. 1983), aff'd in part on reconsideration, 722 F.2d 209 (5th Cir.1984), cert. denied,

467 U.S. 1231(1984); Jones v. Continental Corp., 789 F.2d 1225 (6th Cir. 1986); Indianapolis Colts v. Mayor & City Council, 775 F.2d 177,182(7th Cir.

1985), quoting Knorr Brake Co. v. Harbil, Inc., 738 F.2d 223 (7th Cir. 1984) Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Estates of Blas v. Winkler 792 F.2d 858 (9th Cir. 1986).

Westinghouse Electric Corp. v. NLRB, 809 F2d 419 (7th Cir. 1987) is the only case which has suggested that §1927 sanctions might be based on mere negligence but, in fact, the Seventh Circuit has long adhered to the majority rule and the negligence language in that case was mere dicta. The sanctions in fact were imposed based on the court's findings that "counsel tried to evade both the appellate rules and our order." Id. at 425.

It is dubious that the conflict between the circuits alleged by petitioners actually exists. More

importantly, this case is not worthy of review because this conflict can only be reached if this Court were first to hold that the Court of Appeals erred in adhering to the two express statutory requirements that there be some multiplication of the proceedings and that some excess attorney fees be incurred as a result.

CONCLUSION

Respondent respectfully submits that this case presents no issue worthy of review by this Court and thus the petitions for writs of certiorari ought to be denied.

Respectfully submitted,

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